TREATY RATIFICATION PROCESS AND SEPARATION OF POWERS

HEARING

BEFORE THE

SUBCOMMITTEE ON SEPARATION OF POWERS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S.J. Res. 212

A JOINT RESOLUTION WITH RESPECT TO NUCLEAR ARMS REDUCTION

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TREATY RATIFICATION PROCESS AND SEPARATION OF POWERS

FRIDAY, JULY 30, 1982

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, in room 2228, Dirksen Senate Office Building, commencing at 10:10 a.m., Hon. John P. East (chairman of the subcommittee) presiding.

Staff present: Dr. James McClellan, chief counsel and staff director; James Sullivan and Tom Bovard, counsels; Debra Freshwater, chief clerk; Quentin Crommelin, Jr., administrative assistant; and Sam Francis, legislative assistant.

OPENING STATEMENT OF SENATOR JOHN P. EAST

Senator EAST. I would like to convene this meeting of the Separation of Powers Subcommittee of the Judiciary Committee.

I would like to welcome you all. I shall make a very brief opening comment and then I want to get promptly to our distinguished colleagues who are here this morning. We appreciate their coming and certainly would like to note their presence at this time: The distinguished Senator from Utah, Senator Jake Garn and the very able and distinguished Senator from Idaho, Senator Steven Symms. I appreciate their coming this morning and sharing their views with us.

My senior Senator from North Carolina, Senator Jesse Helms, should be here in due course.

Let me offer a few general comments so that those here might know more about the purpose and scope of this hearing. We are examining Senate Joint Resolution 212,[1] a joint resolution recently reported by the Senate Foreign Relations Committee, that is now before the Senate. Senate Joint Resolution 212 raises a number of important public policy issues for the United States.

I would like to make it clear that we fully appreciate that, because of the military implications, this resolution could be properly brought before the Armed Services Committee and its very talented and distinguished chairman, Senator Tower of Texas. We also realize it has foreign policy implications that are within the jurisdiction of the Foreign Relations Committee with the chairmanship of the able Senator from Illinois, Senator Percy.

[1]Text of S.J. Res. 212 appears in the appendix on p. 189.

What we are concerned about on the Judiciary Committee, however, and particularly here on the Separation of Powers Subcommittee, are some very serious constitutional questions involving separation of powers and the treatymaking process. That is the scope of inquiry of the subcommittee and is our jurisdictional and constitutional concern.

We believe that Senate Joint Resolution 212 raises a separation of powers issue of sufficient magnitude that it warrants this hearing and possibly an additional one if needed. This is what we are pursuing this morning, and we welcome the various witnesses who are here to assist us in this matter. Before turning to our witnesses, let me first state as succinctly as I can the specific separation of powers question that Senate Joint Resolution 212 raises.

There are several aspects of Senate Joint Resolution 212 which arouse curiosity. In particular the subcommittee is concerned about section 3 of Senate Joint Resolution 212, which states, "To provide a basis for progress during the START negotiations, the United States shall continue to refrain from actions which would undercut the SALT I and SALT II agreements." The use of the word "undercut" is intriguing. One interpretation might be that the United States could not take any action that would be at odds with the SALT agreements. Conversely it could also mean that our conduct shall be in conformity with those two treaties. The intent of this section is not entirely clear. Also, I believe it is noteworthy that the resolution contains language drawn from the SALT II Treaty. For example, section 3 uses the term "provided the Soviet Union shows equal restraint."

The crucial term is that this resolution would attempt to revise an already expired treaty, SALT I, and would give the force of law to SALT II—a treaty that is before the Senate in the Foreign Relations Committee but has not been ratified. I shall state the matter candidly. It would appear, though, that may not be the intention, that the effect of this resolution would be to circumvent the treatymaking process. We should be mindful of the fact that as a matter of law, SALT II is technically still before the Senate Foreign Relations Committee. Obviously, in preceding sessions of the Congress there were not the votes to ratify it. The Senate has not sent it back to the White House, nor has the White House withdrawn the treaty. It is unequivocably here.

President Carter asked that the Senate postpone consideration of SALT II because of the Soviet Union's invasion of Afghanistan. Soviet troops remain in Afghanistan.

President Reagan has consistently maintained, both before and after the 1980 Presidential election, that he is opposed to SALT II. Therefore, we are concerned that this resolution, through a simple majority vote of the Senate and the House, would undermine the principle of separation of powers by circumventing the treatymaking functions of the Senate and the President. In the first place, Senate Joint Resolution 212 would usurp the Presidential prerogative of ratifying treaties. The President of the United States, Ronald Reagan, has clearly not indicated by any formal means of the treaty ratification process that he approves of SALT II. It is quite clear the Senate would not have passed it when it was

originally submitted. I think it is equally doubtful that it would pass today.

Thus, it would appear that Senate Joint Resolution 212 improperly encroaches upon the prerogatives of the President in his conduct of foreign relations. In addition, Senate Joint Resolution 212 apparently would do violence to our own power by decreeing that we shall share it with the U.S. House of Representatives. In other words, the implicit intent and undeclared purpose of Senate Joint Resolution 212 are apparently to obligate the United States to the SALT agreements through a joint resolution rather than a treaty.

These are basically the parameters of the problem the subcommittee wishes to explore.

Again, I wish to welcome my distinguished colleagues. Senator Garn, if you would like to make your statement. We are prepared to begin. As chairman I would like to urge all witnesses to summarize their remarks whenever possible. All printed material, of course, will be made a part of the record.

Senator Garn, we welcome you and appreciate your comments.

STATEMENT OF HON. JAKE GARN, A U.S. SENATOR FROM THE STATE OF UTAH

Senator GARN. Thank you very much, Mr. Chairman.

I will summarize my statement as quickly as I can and ask unanimous consent that the entire statement be placed in the record.

I am pleased to have this opportunity to testify. I cannot tell you how sincerely I mean that because despite the fact that, since coming to the Senate in 1974, I have immersed myself in the subject of strategic arms control and its implications for the national security of the United States, thereby spending a good deal of my time and effort on SALT II as a member of the Senate Armed Services Committee and the Intelligence Committee, I was denied the senatorial courtesy of testifying before the Foreign Relations Committee. I felt there might be something I could contribute. Apparently the Foreign Relations Committee did not think so.

So I thank you for the opportunity of being able to testify here today.

The Senate Foreign Relations Committee's arms control resolution, Senate Joint Resolution 212, raises a serious constitutional issue with respect to the treaty ratification process and the proper role of the Senate in that process. The principal focus of attention in this regard has been section 3 of the resolution which states the following:

> To provide a basis for progress during the START negotiations, the United States shall continue to refrain from actions which would undercut the SALT I and SALT II agreements, provided the Soviet Union shows equal restraint * * *.

Use of the verb "shall," thereby establishing a mandatory and legal requirement, poses the question as to whether the language of this resolution would constitute de facto ratification of the SALT II Treaty. The question exists because a joint congressional resolution, signed by the President, has the force of law.

No doubt, the situation that would be created by such a development would not be without a certain degree of ambiguity. For ex-

ample, the exact meaning of the term "not undercut" has not been clearly determined. The Reagan administration seems to have deliberately chosen to leave the meaning of the term vague, and we have no idea what the Soviet interpretation might be. In addition, President Reagan never specifically committed the United States to a policy of not undercutting SALT I and SALT II. Rather he said that:

> As for existing strategic arms agreements, we will refrain from actions which undercut them so long as the Soviet Union shows equal restraint.

Now the simple fact of the matter is that the SALT I Interim Agreement on Strategic Offensive Arms expired in 1977 and the SALT II Treaty has never secured the advice and consent of the Senate to its ratification. Indeed, former President Carter asked that the treaty not be considered by the Senate following the Soviet Union's brutal invasion of Afghanistan, and every official of this administration, including the President, has declared SALT II to be "fatally flawed and dead." Given these factors, it is curious that the Foreign Relations Committee felt compelled to commit the United States to these agreements.

Finally, U.S. restraint is made contingent upon reciprocal restraint by the Soviets. Unfortunately, the history of arms control is littered with examples of flagrant Soviet violations. I am sure that my colleagues, Senators Helms and Symms, will discuss in further detail this sordid aspect of Soviet arms control policy. It is sufficient, in my view, to remember that as we sit here in this country, debating the merits of a nuclear freeze, and as public demonstrations are held in Western Europe to protest the NATO theater nuclear force modernization program, Afghan freedom fighters and the peoples of Laos and Cambodia are choking to death in their own blood—killed by Soviet biological weapons. These same weapons are outlawed by two international agreements to which the Soviet Union is party. The blatant hypocrisy of it all is appalling.

Despite the obvious legal ambiguity that would exist with respect to the question of de facto treaty ratification, I am firmly convinced that the Senate should avoid any action, outside of the constitutional process provided to carry out such an action, that might be interpreted as ratification of SALT II. That constitutional process, through which the President has the power, "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur," has not been followed.

Therefore, the Foreign Relations Committee's resolution, Senate Joint Resolution 212, at a very minimum, should be amended in order to delete the mandatory requirement implied by the verb "shall, with respect to U.S. compliance with the terms of SALT I and SALT II.

My position on this matter is fully consistent with the opinion I expressed several years ago when there were reports that President Carter intended to circumvent the treaty ratification process by submitting the SALT II Treaty for consideration by both Houses of Congress in the form of an executive agreement. I believed that such an approach was wrong then, and I firmly believe that such an approach would be wrong today. The Senate should not abdicate its constitutional authority and responsibility in this matter. Nor

should it actively promote a binding resolution that may be interpreted as a backdoor ratification of the discredited SALT II Treaty.

The effort to tie the United States to SALT II also holds potentially negative consequences for the Reagan administration's program to modernize our triad of strategic nuclear forces. We have all read or heard about challenges to the validity of an MX closely spaced basing, or dense pack, decision on the basis that it would run contrary to the SALT II restriction prohibiting the construction of additional fixed ICBM launchers. Regardless of what one thinks of the dense pack option, and the Congress will have ample opportunity to examine whatever MX basing proposal the President makes, the fact is that the terms of an unratified treaty are already being cited as sufficient reason for rejecting an MX basing option, thereby jeopardizing the development and eventual deployment of a modernized weapon system we desperately need.

Such a development would contradict section 33 of the Arms Control and Disarmament Act which states:

> That no action shall be taken under this or any other law that will obligate the United States to disarm or to reduce or to limit the armed forces of armaments of the United States, except pursuant to the treaty-making power of the President under the Constitution.

Now that is law. I believe that we are going even beyond constitutional questions. Senate Joint Resolution 212, the Senate Foreign Relations Committee bill, helps to create a political atmosphere in which the potential for violating the Arms Control and Disarmament Act is increased. It is very clear. Even lawyers should not have a hard time interpreting that. We nonlawyers do not have any trouble figuring out clear language like that.

We are, in my opinion, headed in a very dangerous direction. I would be the first to admit that the President's statement with respect to U.S. policy on arms control compliance has been interpreted and used by individuals who have fueled the fires of irresponsibility. An example of such irresponsible action can be found in the decision by the House of Representatives to adopt, without debate, an amendment by Congressman Les Aspin prohibiting the expenditure of funds for any weapon system whose procurement, testing, or deployment would violate the SALT I or SALT II treaties. It is unfortunate that the President's statement, made in an effort to address himself to the misguided criticisms of his defense and arms control policies, has been used to open up a Pandora's box of mischief which if unchecked may ultimately rebound against the national security interests of this country.

We may soon repeat the arms control mistakes of the 1970's. We may unilaterally inhibit our own weapon modernization programs in order to conform to the spirit of flawed arms control agreements—a spirit the Kremlin neither recognizes nor shares. We may find ourselves negotiating with the Soviets from a position of relative weakness, with all the dangers that it involves.

As I have already said, I am concerned about any action which might imply an endorsement of the terms of SALT II.

Let me just say also that SALT II was submitted by President Carter as a treaty, not as an executive agreement. President Reagan has not called for the consideration of SALT II as an executive agreement. Therefore, SALT II should continue to be treated

as requiring two-thirds vote, approval of the Senate as required in the Constitution.

But, you know, Mr. Chairman, what we are dealing with today is neither a treaty nor an executive agreement. It is domestic legislation that would be binding only on the United States and not the Soviet Union. It seems to me the course we are following is more dangerous than either of the ones we have discussed thus far.

I realize this is departing from the constitutional subject of this particular hearing but just let me say why I feel so strongly that SALT II should not be ratified and certainly should not be ratified in a backdoor approach, through domestic legislation.

If ever in my political career I have seen a fraud perpetrated on the American people, it is SALT II. I participated in debates over a period of 2 years all across this country and the proponents of this treaty always talked about the horrors of nuclear war They talked about everything but the treaty and to this day very few people still understand what is in SALT II.

I have debated the issue of SALT II in many parts of this country. I can remember that Senator Culver and I would debate this question before college audiences, and I would find that none of them had ever seen a copy of the treaty. As a matter of fact, I liked to poll the students to see how many favored SALT II. Generally, at least 95 percent would favor it. I would say, Fine. "You do not understand. You know nothing about it at this point. So rather than get into a lot of rhetoric about the horrors of nuclear war, which we all abhor, I will pass out copies of the treaty to you and we are going to discuss facts. We are going to discuss provisions of the treaty and then when we are through with that, I will ask you to raise your hands and ask how many still support the ratification of SALT II."

In that kind of debate it would turn around dramatically, 75 percent of the students then disapproved of the treaty. Because what they found out was the treaty is not arms control; it simply bore no relationship to arms control. It allowed the largest increases in nuclear weapons in the history of the world. It was cited that the Soviets had to reduce their forces by 10 percent, that is true, 10 percent of their launchers. The students never knew that a launcher is a hole in the ground, it is an airplane. It is not a missile. It is not a warhead. So there are obviously no limits on the production or the quantity of warheads or missiles that any country could have.

There was a limitation on launchers. The Soviets had about 2,500. That was to be reduced to 2,250, that is a 10-percent reduction. So they would remove approximately 250 launchers of their old type, SS-9's and SS-11's. That is as far as the treaty went in achieving arms control.

This required the Soviets to remove 10 percent of their total launchers, but no one ever bothered to discuss the sublimits of 1,320 total systems, including bombers, sea-based and land-based intercontinental ballistic missiles, or the sublimits of 820 land-based MIRV'ed intercontinental ballistic missiles which allowed MIRV'ed systems to replace those single warhead launchers that were affected by the 10-percent reduction.

You do not have to be too much of a mathematician to realize that if you remove 250 single-warhead launchers and you allow

more than 300 MIRV'ed launchers with up to 10 more heads each that the result if not arms control. So we legalize the most massive increase in nuclear arms in the history of this world

I am one who believes that both sides ought to reduce. We ought not ratify a treaty that legalizes the most massive increase in weapons in our history and then to use that as a place to negotiate SALT III. That is like saying, "I have a new lease with my landlord. He just tripled my rent but he has agreed to have further discussions about reducing my rent."

So that is what we said in SALT II. We are going to allow both sides to increase from 5,000 and 9,000 warheads to 12,000 and 15,000 and that is the basis for getting them to reduce in the future. I do not understand this kind of logic, just do not understand it. It simply was not arms control. The resolution, Senate Joint Resolution 212, raises the prospect of de facto ratification of a treaty that goes exactly in the opposite direction and contrary to the very aims that its proponents want to achieve; namely to reduce the nuclear threat.

Second, SALT II was not equitable. It allows to the Soviets numbers and types and sizes of weapons that we simply were not allowed to have. Like the Backfire bomber. We had canceled the B–1. Like the matter of the SS–18's, the heavy weapons. The Soviets asked for 308. President Carter said you should only have 150 of these weapons.

You know where we compromised? The Soviet Union asked for 308. We said they should have 150. So we compromised at 308. Even in Utah we would have tried to get them down to 300, a token reduction. There was none. They stonewalled us and we simply caved.

I would not have expected the Soviet Union to come down to 150 or even 200, but some indication of goodwill was certainly in order. Maybe they could have reduced to 275, just a political gesture that they were willing to come somewhat to our direction. Over and over again they did not.

Third, and maybe most important, was the fact that SALT II was not verifiable. I do not care what kind of treaty we have with the Soviet Union, it must be verifiable. Even if I could write it, and I felt it was equitable to both sides, if it could not be verified, it would be unacceptable. So unless we can verify the treaty, even if it is a good treaty, it should not be ratified.

Due, in part, to the Iranian situation and the loss of sites to monitor Soviet ICBM tests, we still do not have verification capabilities through national technical means to verify SALT I or SALT II.

I will stop here. I realize I have taken longer than I had intended, or longer than you would like me to have, and I will put the balance of my statement into the record.

But I thank you for the opportunity to be able to be heard today.

Senator EAST. Senator Garn, I appreciate the opportunity to have you appear before the subcommittee. You have added greatly to our perspective and understanding.

You initially stated that central to our concern is the gross distortion and erosion of the treatymaking power implied in the constitutional dilemma at issue here. Your testimony clearly frames this issue and accurately reflects the concern of the subcommittee.

Beyond that, you have indicated the great weaknesses you see in SALT II which, of course, is a vital component of the entire debate here. I appreciate your salient comments regarding separation of power implications.

Before turning to Senator Helms, I would like to note for the record that we have asked the ranking minority member on the Separation of Powers Subcommittee, Senator Baucus, to suggest appropriate witnesses for this hearing. We have not heard from Senator Baucus on this question, but look forward to any suggestions he may have that would add to our understanding on the resolution question. We have set a date for a second hearing on Senate Joint Resolution 212 if it is needed. I would like to make it clear as chairman of the subcommittee that we are interested in a balanced inquiry.

Senator Helms, I want to welcome you, my distinguished senior Senator from North Carolina.

STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator HELMS. Let me defer to the distinguished Senator from Idaho who has been waiting.

Senator SYMMS. Please go ahead.

Senator HELMS. I do have a simultaneous meeting of the Foreign Relations Committee to which I hope to return.

Could I inquire of the Chair, inasmuch as he has mentioned the desire to have both sides of the subject, did not the subcommittee invite Mr. Rostow to be here this morning?

Senator EAST. That is true, Senator. We have him on the witness list and were looking forward to his testimony. Until about 30 minutes ago, we were assuming he would be here. However, we were notified shortly before this hearing began that he would not be appearing. But we regret his cancellation and would have hoped he could have offered some important insights.

Senator HELMS. I was intending——

Senator EAST. I have been advised by staff that Mr. Rostow was to appear on a television show concerning the nuclear freeze question.

Senator HELMS. I was hoping he would come and speak to the record as to violations of the SALT Treaty. This needs to be done and I hope the distinguished chairman and the members of the subcommittee, and indeed the full committee, will urgently request his fulfilling an invitation the next time he is invited because this needs to be discussed and it needs to be understood by the American people. Moreover, I do not wish to presume on the prerogatives of the subcommittee but I hope that Mr. Rostow will be interrogated in detail and with emphasis on the verification. Those two things, violation and verification, are two of the things that the American people want to know about.

Senator Garn has been very eloquent and absolutely correct in his assessment of how little do the American people understand what is at stake in this business of START or SALT and all the rest of it. It is not a matter of one side favoring peace and the other side not. Mr. Rostow can clear that up, if he will.

Now, Mr. Chairman, I am so grateful to you and the subcommittee for considering the approval of Senate Joint Resolution 212 which would, as Senator Garn and your own good self emphasized, would affect the principle of the separation of powers among the three branches of Government. The fundamental issue that appears to me is the attempt to achieve a de facto ratification of the SALT II Treaty by a simple majority vote. Thus a treaty which has never been approved by two-thirds of the U.S. Senate, and never ratified, would have full force and effect controlling the strategic deployment of the United States.

Now, a secondary question is whether the Executive, by a simple executive agreement outside the consultation with the Congress, can achieve the aims of a treaty which never had sufficient support to pass a resolution of agreement to ratification. A treaty which is reported to the Senate by the Foreign Relations Committee, as the chairman knows, is placed upon the Senate Calendar. If no action is taken upon the treaty, it is returned to the committee at the end of the session. It thereupon remains in the committee until it is reported out again, or until the Senate, by simple resolution, orders the treaty returned to the President. There are many treaties which have been reported, but never acted upon. In the mid-50's, some 42 treaties were returned to the President, some of them having languished in committee since the 1880's.

Now, how about SALT II? After being reported favorably from the Foreign Relations Committee, and I might say, Mr. Chairman, without my support, SALT II was not able to achieve sufficient strength for the majority leader to even feel confident in bringing it up for debate in executive session of the Senate. The Armed Services Committee held collateral hearings, although it was not technically referred to that committee.

In its report, the Armed Services Committee found it fatally flawed, a judgment repeated during 1980 by President Reagan as a candidate for office. After the invasion of Afghanistan, President Carter did not feel that the time for SALT II debate was propitious, and asked that it not be brought up.

After President Reagan assumed office, he repeated his judgment that the treaty was dead, a sentiment echoed publicly by Secretary of State Alexander Haig. Under customary international law and by article 18 of the Vienna Convention, signatories of treaties are obliged not to defeat the object and purpose of a treaty signed by the President until the United States has made it clear that it does not intend to become a party. Although the United States has not ratified the Vienna Convention, some argue that we have a moral obligation not to defeat the object and purpose of the treaty. On the other hand, the President and his chief foreign policy spokesman have made it clear that the United States does not intend to become a party. Moreover, on a practical level, some of the deadlines in the treaty have already passed, and the text is therefore obsolescent.

In my opinion, what we ought to be discussing here today is not whether we should observe the terms of SALT II, but whether or not the Senate should pass a resolution returning SALT II to the President. I would suggest to the distinguished members of this subcommittee that they consider initiating such a resolution as a

result of these hearings to remedy the separation of powers issues which have been raised. An unambiguous resolution returning SALT II to the President would clarify the existing situation and put an oaken stake in the heart of this fatally flawed proposal which keeps coming back to haunt us.

Now, then, Mr. Chairman, on June 9, the Foreign Relations Committee adopted language for Senate Joint Resolution 212 which includes the following language:

> Whereas President Reagan declared that the United States would continue to refrain from actions that would undercut existing SALT agreements as long as the Soviet Union shows equal restraint. * * *
>
> Resolved that:
>
> To provide a basis for progress during the START negotiations.

Get this, Mr. Chairman,

> The United States shall continue to refrain from actions which would undercut the SALT I and SALT II agreements, provided the Soviet Union shows equal restraint.

Now do you see, Mr. Chairman, why some of us feel it is important for Mr. Rostow to come here as he should have come this morning and discuss the violations by the Soviet Union.

But, in any case, the operative word in the second paragraph quoted is "shall." The original text of the resolution, as drafted, had the word "should." The difference is clear. "Shall" is mandatory, and imposes a legal obligation; "should" is hortatory, and expresses a pious hope, without obligation. It is the word "shall" that imposes the terms of SALT II without benefit of two-thirds of the Senate agreeing to the treaty.

I want to make it clear that I do not think that "should" ought to be approved. I do not think we should observe SALT II. It was a bad treaty, for reasons I outlined in the report on Senate Joint Resolution 212. Indeed, it is a dangerous treaty threatening the optional security of our Nation. But it is that word "shall" which attempts to approve the SALT II without a two-thirds vote and with only a majority vote of the U.S. Senate and the House of Representatives.

Now, Mr. Chairman, nor do I think that the resolution reflects the President's policy. Note that the resolution quotes the President as declaring that the United States would continue to refrain from actions that would undercut existing SALT agreements. The key phrase is "existing SALT agreements." The President never used the acronym SALT.

What the President said last Memorial Day was this:

"As for existing strategic arms agreements, we will refrain from actions which undercut them so long as the Soviet Union shows equal restraint."

No mention, no use of the word SALT.

The point is that there are some strategic arms agreements, such as the ABM Treaty and possibly the Test Ban Treaty, which are "existing." But neither SALT I nor SALT II are "existing." Agreements at the present time—that is to say, agreements in force.

I have to assume that President Reagan chose those words to be nonspecific. The only "existing strategic arms agreement," properly so called, at the present time is the Anti-Ballistic Missile Treaty of 1972, which comes up for review in October. Although it was ne-

gotiated and ratified in conjunction with tbe Interim Agreement on Strategic Arms Limitation, commonly known as SALT I, it is technically not part of SALT I. Indeed, it is of infinite duration, whereas SALT I expired in October 1977, and no longer has effect in international law

SALT I, therefore, is not "an existing strategic arms agreement," even though the United States and the Soviet Union issued purported "parallel statements" in October 1977 promising unilaterally to observe the terms. The statements are not parallel in actuality because the U.S. promise was indefinite in duration, whereas the Soviet promise was linked to the successful completion of a SALT II agreement. That makes a difference. It makes a difference perhaps in terms of the survival of the United States of America as a nation.

It should be noted that device of parallel unilateral statements of intent to take the place of actual treaties is obviously not appearing for the first time in Senate Joint Resolution 212. It was a device first employed by the Carter administration. I am sorry to see it even suggested by President Reagan, although it is not clear in my mind that he was actually doing so. Clearly, however, it is the intention of Senate Joint Resolution 212 to put words in the President's mouth and to repeat the blunder of 1977.

But if the Soviet promise to observe SALT I was contingent upon the successful completion of a SALT II agreement, that contingency has failed. A resolution of ratification of SALT II was never approved by the U.S. Senate. Therefore legally no agreement exists, and the President has said it is dead.

The only standing SALT II has in international law is the principle that the parties will not undercut the terms as long as there is a reasonable chance it will be ratified. But there is no such reasonable chance. SALT II has never been presented for debate either to the Supreme Soviet or to the U.S. Senate, and there is no prospect that there ever will be—at least, not in treaty form. There is, therefore, no agreement.

The "whereas" clause of Senate Joint Resolution 212 misrepresents the President's statement by converting a statement about the ABM Treaty into support for SALT. But the resolving clause is even more misleading when it demands the observance of both SALT I and SALT II, both of them nonexistent agreements, with the implication that this requirement is somehow based on the President's statement. It is not so, in my view; the clause expresses exactly the opposite of the President's position.

What Senate Joint Resolution 212 does, therefore, is to take the terms of a discredited draft treaty that never reached the status of a ratified agreement and impose them upon the United States by simple majority This is an outright constitutional subterfuge, and threatens the entire treatymaking process. By allowing a treaty to be approved surreptitiously, the Senate is giving up its own powers and transferring them to the House of Representatives. Whereas treaties require a two-thirds vote in the Senate only, allowing the House to vote on treaty matter in the form of a resolution means the Senate is surrendering its prerogatives.

The constitutional issue is matched by the substantive issue in its threat to our political system and national security. It is bad

enough that a devious attempt is being made to circumvent the treatymaking process; but to do so on behalf of a treaty that is fatally flawed and which threatens our independence and security is doubly to be condemned.

Mr. Chairman, I thank you for the opportunity of visiting with you this morning and if I may ask your further indulgence, I request that the subcommittee record my additional views which accompany Senate Report No. 97-493 and Senate Joint Resolution 212.

Senator EAST. So ordered, and we shall do that, Senator.

Again, we deeply appreciate your contribution to this hearing and your very valuable observations.

Because of the time constraints we are under, we will move promptly to Senator Symms and move along as expeditiously as we can.

STATEMENT OF HON. STEVEN D. SYMMS, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator SYMMS. Thank you very much, Mr. Chairman, and I wish to strongly compliment you for holding these hearings.

As you know, I corresponded with you as the chairman of this subcommittee earlier to raise the question of the separation of powers with respect to the treatymaking responsibilities that are outlined in the Constitution for the U.S. Senate.

I appreciate very much your interest in this issue and your initiative in holding hearings on the treatymaking power. I must say, in starting my testimony, that I would like to associate myself with the excellent testimony of both Senator Garn and Senator Helms. I strongly agree with both of those Senators in their arguments against SALT II. In particular I agree with the leading point that Senator Garn makes that the SALT II Treaty does not reduce the threat that the world faces in terms of numbers of weapons that are being produced in any way. If SALT II was ratified and complied with by both sides, the Soviet strategic threat to the United States would grow enormously. It would not at all reduce the threat as far as the number of weapons that are being built. The SALT II Treaty is not equitable, in my judgment, and I would agree with what Senator Garn said, that it is not equitable and decidedly gives great advantages in terms of numbers of weapons platforms, heavy missiles and aircraft to the Soviets. And third, I agree with Senator Garn that it is not verifiable. I think those points need to be brought up again and again and I might, just before I make my very brief statement, inquire of the Chair if there will be witnesses this morning, that represent Mr. Rostow or are they just removed from the testimony today?

Senator EAST. We do have, Senator, the General Counsel for the U.S. Arms Control and Disarmament Agency, Mr. Richard Richstein, who has kindly agreed to join us. So, we will have his testimony later this morning.

Senator SYMMS. I appreciate that very much. I would like to stay and ask some questions of ACDA. I would also hope that either the Chair or counsel could pose a question to the witness from the Arms Control and Disarmament Agency with respect to the SALT

violations. Senator Helms mentioned the test ban treaty this morning and the violations. I would like ACDA to comment for us for our record on what has been reported in the press and I would ask unanimous consent to insert in the record the column of Evans and Novak on July 22, 1982, which reports on the so-called Fourth of July firecracker. It was reported in the press that the Soviets test fired a weapon of 250 kilotons underground in violation of the test ban treaty. If that is true, I would like to have our ACDA agency verify that for the public, for the American people, to realize what the Soviets have been doing.

So, I hope that we could discuss this question.

But, Mr. Chairman, my basic testimony will be very brief because I believe that Senate Joint Resolution 212 would result in the de facto ratification of the SALT II Treaty by simple majority of the Senate and House, as I indicated to you earlier in correspondence.

This legislation would circumvent the treatymaking process of the Senate and improperly involve the House in consenting to a treaty.

Article I, section 2 of the Constitution provides that "the President shall have power, by and with the advice of the Senate, to make treaties provided two-thirds of the Senators present concur."

The President, and only the President, decides whether the United States shall be obligated under a treaty or an executive agreement requiring congressional approval. The controlling factor in this case is that the Senate has the SALT II Treaty before it as the two Senators here earlier this morning have both alluded to, and the SALT II Treaty has neither been rejected nor accepted. As long as that treaty is before the Senate, in a state of postponement and limbo, the Senate is precluded from treating the treaty as an executive agreement requiring congressional approval. If the SALT II Treaty is ever to become an executive agreement, the President must formally withdraw the treaty from the Senate. Then the President must redesignate it as an executive agreement requiring congressional approval, and resubmit it to Congress. The Senate is not free to transform a treaty into an executive agreement, and then seek compliance with the agreement through a simple majority of the Senate.

The President, and only the President, has the power to create an executive agreement, or transform a treaty into an executive agreement. An executive agreement, as the name itself implies, must originate from the Executive.

What we are witnessing here is the Foreign Relations Committee trying to convert a treaty into an executive agreement. It is my judgment that it is totally improper action on the part of the committee to take and it is something I think could be challenged from a constitutional and parliamentary standpoint.

For the Senate to act upon Senate Joint Resolution 212 which would in effect ratify the SALT II Treaty as an executive agreement, the Senate would be encroaching upon the powers of the President, as well as improperly delegating some of the Senate's own powers to the House.

In addition to this statement, Mr. Chairman, I would request that my statement originally printed in the Congressional Record

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on May 27, 1982, in a speech I addressed to the Senate, be reprinted in this hearing record and being in a form which was reprinted by a conservative organization entitled, "President Reagan's Decision to Continue SALT II Policy is Illegal." My original title was "How the Soviets Violate SALT II, While the United States Violates Its Own Laws To Comply With SALT II." I would submit this for the record. This has been reprinted by the Conservative Caucus, national headquarters at 450 Maple Avenue, East Vienna, Va. I would submit this with my statement for the record.

Mr. Chairman, I thank you again very much for the opportunity to appear here.

I also ask unanimous consent to submit for the record the article entitled, "U.S. Probes Illegal Russian Nuke Test" of the Evans and Novak column from the New York Post dated July 22, 1982.

Thank you very much, Mr. Chairman. I would hope that the Chair would be able to pose some of the questions I mentioned in my testimony to some of the witnesses this morning.

Senator EAST. Thank you Senator Symms. I deeply appreciate your testimony.

[The prepared statement of Senator Garn and material supplied by Senators Helms and Symms follow:]

PREPARED STATEMENT OF SENATOR JAKE GARN

GOOD MORNING, MR. CHAIRMAN. IT IS A PLEASURE FOR ME TO APPEAR BEFORE YOU AND THE MEMBERS OF THE SEPARATION OF POWERS SUBCOMMITTEE TODAY TO TESTIFY ON THE CONSTITUTIONAL AND STRATEGIC IMPLICATIONS OF THE FOREIGN RELATIONS COMMITTEE'S ARMS CONTROL RESOLUTION (S. J. RES 212). LET ME SAY FIRST THAT I AM NOT A CONSTITUTIONAL LAWYER; INDEED, I AM NOT A LAWYER AT ALL. IN FACT, I AM OF THE OPINION THAT THIS COUNTRY WOULD BE BETTER OFF WITH FAR LESS LAWYERS, FAR LESS LITIGATION, AND, MOST OF ALL, FAR LESS LAWS. BUT THAT IS A SUBJECT FOR ANOTHER DAY.

SINCE COMING TO THE SENATE IN 1974, I HAVE IMMERSED MYSELF IN THE SUBJECT OF STRATEGIC NUCLEAR ARMS CONTROL AND ITS IMPLICATIONS FOR THE NATIONAL SECURITY OF THE UNITED STATES. IN THAT LIGHT, I AM PREPARED TO OFFER SOME OBSERVATIONS CONCERNING SENATE JOINT RESOLUTION 212 AND THE DIRECTION OF ARMS CONTROL POLICY FOR THE FUTURE.

THE SENATE FOREIGN RELATIONS COMMITTEE'S ARMS CONTROL RESOLUTION, S.J. RES. 212, RAISES A SERIOUS CONSTITUTIONAL ISSUE WITH RESPECT TO THE TREATY RATIFICATION PROCESS AND THE PROPER ROLE OF THE SENATE IN THAT PROCESS. THE PRINCIPAL FOCUS OF ATTENTION IN THIS REGARD HAS BEEN SECTION 3 OF THE RESOLUTION WHICH STATES THE FOLLOWING:

> "TO PROVIDE A BASIS FOR PROGRESS DURING THE START NEGOTIATIONS, THE UNITED STATES SHALL CONTINUE TO REFRAIN FROM ACTIONS WHICH WOULD UNDERCUT THE SALT I AND SALT II AGREEMENTS, PROVIDED THE SOVIET UNION SHOWS EQUAL RESTRAINT..." (EMPHASIS ADDED)

USE OF THE VERB "SHALL", THEREBY ESTABLISHING A MANDATORY AND LEGAL REQUIREMENT, POSES THE QUESTION AS TO WHETHER THE LANGUAGE OF THIS RESOLUTION WOULD CONSTITUTE DE FACTO RATIFICATION OF THE SALT II TREATY. THE QUESTION EXISTS BECAUSE A JOINT CONGRESSIONAL RESOLUTION, SIGNED BY THE PRESIDENT, HAS THE FORCE OF LAW.

No doubt, the situation that would be created by such a development would not be without a certain degree of ambiguity. For example, the exact meaning of the term "not undercut" has not been clearly determined. The Reagan Administration seems to have deliberately chosen to leave the meaning of the term vague, and we have no idea what the Soviet interpretation might be. In addition, President Reagan never specifically committed the U.S. to a policy of not undercutting SALT I and SALT II. Rather he said that:

> "As for existing strategic arms agreements, we will refrain from actions which undercut them so long as the Soviet Union shows equal restraint."

Now the simple fact of the matter is that the SALT I Interim Agreement on Strategic Offensive Arms expired in 1977 and the SALT II Treaty has never secured the advice and consent of the Senate to its ratification. Indeed, former President Carter asked that the Treaty not be considered by the Senate following the Soviet Union's brutal invasion of Afghanistan, and every official of this Administration, including the President, has declared SALT II to be "fatally flawed and dead." Given these factors, it is curious that the Foreign Relations Committee felt compelled to commit the U.S. to these agreements.

Finally, U.S. restraint is made contingent upon reciprocal restraint by the Soviets. Unfortunately, the history of arms control is littered with examples of flagrant Soviet violations. I am sure that my colleagues, Senators Helms and Symms, will discuss in further detail this sordid aspect of Soviet arms control policy. It is sufficient, in my view, to remember that as we sit here in this country, debating the merits of a nuclear freeze, and as public demonstrations are held in Western Europe to protest the NATO theatre nuclear force modernization program, Afghan freedom fighters and the peoples of Laos and Cambodia are choking to death in their own blood -- killed by Soviet biological weapons. These same weapons are outlawed by two international agreements to which the Soviet Union is party. The blatent hypocrisy of it all is appalling.

DESPITE THE OBVIOUS LEGAL AMBIGUITY THAT WOULD EXIST WITH RESPECT TO THE QUESTION OF DE FACTO TREATY RATIFICATION, I AM FIRMLY CONVINCED THAT THE SENATE SHOULD AVOID ANY ACTION, OUTSIDE OF THE CONSTITUTIONAL PROCESS PROVIDED TO CARRY OUT SUCH AN ACTION, THAT MIGHT BE INTERPRETED AS RATIFICATION OF SALT II. THAT CONSTITUTIONAL PROCESS, THROUGH WHICH THE PRESIDENT HAS THE POWER, "BY AND WITH THE ADVICE AND CONSENT OF THE SENATE, TO MAKE TREATIES, PROVIDED TWO THIRDS OF THE SENATORS PRESENT CONCUR," HAS NOT BEEN FOLLOWED.

THEREFORE, THE FOREIGN RELATIONS COMMITTEE'S RESOLUTION, S.J. RES. 212, SHOULD, AT A VERY MINIMUM, BE AMENDED IN ORDER TO DELETE THE MANDATORY REQUIREMENT IMPLIED BY THE VERB "SHALL" WITH RESPECT TO U.S. COMPLIANCE WITH THE TERMS OF SALT I AND SALT II.

MY POSITION ON THIS MATTER IS FULLY CONSISTENT WITH THE OPINION I EXPRESSED SEVERAL YEARS AGO WHEN THERE WERE REPORTS THAT PRESIDENT CARTER INTENDED TO CIRCUMVENT THE TREATY RATIFICATION PROCESS BY SUBMITTING THE SALT II TREATY FOR CONSIDERATION BY BOTH HOUSES OF CONGRESS IN THE FORM OF AN EXECUTIVE AGREEMENT. I BELIEVED THAT SUCH AN APPROACH WAS WRONG THEN, AND I FIRMLY BELIEVE THAT SUCH AN APPROACH WOULD BE WRONG TODAY. THE SENATE SHOULD NOT ABDICATE ITS CONSTITUTIONAL AUTHORITY AND RESPONSIBILITY IN THIS MATTER. NOR SHOULD IT ACTIVELY PROMOTE A BINDING RESOLUTION THAT MAY BE INTERPRETED AS A BACKDOOR RATIFICATION OF THE DISCREDITED SALT II TREATY.

THE EFFORT TO TIE THE U.S. TO SALT II ALSO HOLDS POTENTIALLY NEGATIVE CONSEQUENCES FOR THE REAGAN ADMINISTRATION'S PROGRAM TO MODERNIZE OUR TRIAD OF STRATEGIC NUCLEAR FORCES. WE HAVE ALL READ OR HEARD ABOUT CHALLENGES TO THE VALIDITY OF AN MX CLOSELY SPACED BASING, OR DENSE PACK, DECISION ON THE BASIS THAT IT WOULD RUN CONTRARY TO THE SALT II RESTRICTION PROHIBITING THE CONSTRUCTION OF ADDITIONAL FIXED ICBM LAUNCHERS. REGARDLESS OF WHAT ONE THINKS OF THE DENSE PACK OPTION, AND THE CONGRESS WILL HAVE AMPLE OPPORTUNITY TO EXAMINE WHATEVER MX BASING PROPOSAL THE PRESIDENT MAKES, THE FACT IS THAT THE TERMS OF AN UNRATIFIED TREATY ARE ALREADY

BEING CITED AS SUFFICIENT REASON FOR REJECTING AN MX BASING OPTION, THEREBY JEOPARDIZING THE DEVELOPMENT AND EVENTUAL DEPLOYMENT OF A MODERNIZED WEAPON SYSTEM WE DESPERATELY NEED.

SUCH A DEVELOPMENT WOULD CONTRADICT SECTION 33 OF THE ARMS CONTROL AND DISARMAMENT ACT WHICH STATES:

> "THAT NO ACTION SHALL BE TAKEN UNDER THIS OR ANY OTHER LAW THAT WILL OBLIGATE THE UNITED STATES TO DISARM OR TO REDUCE OR TO LIMIT THE ARMED FORCES OR ARMAMENTS OF THE UNITED STATES, EXCEPT PURSUANT TO THE TERATY-MAKING POWER OF THE PRESIDENT UNDER THE CONSTITUTION..." (EMPHASIS ADDED)

WE ARE, IN MY OPINION, HEADED IN A VERY DANGEROUS DIRECTION. I WOULD BE THE FIRST TO ADMIT THAT THE PRESIDENT'S STATEMENT WITH RESPECT TO U.S. POLICY ON ARMS CONTROL COMPLIANCE HAS BEEN INTERPRETED AND USED BY INDIVIDUALS WHO HAVE FUELED THE FIRES OF IRRESPONSIBILITY. AN EXAMPLE OF SUCH IRRESPONSIBLE ACTION CAN BE FOUND IN THE DECISION BY THE HOUSE OF REPRESENTATIVES TO ADOPT, WITHOUT DEBATE, AN AMENDMENT BY CONGRESSMAN LES ASPIN PROHIBITING THE EXPENDITURE OF FUNDS FOR ANY WEAPON SYSTEM WHOSE PROCUREMENT, TESTING OR DEPLOYMENT WOULD VIOLATE THE SALT I OR SALT II TREATIES. IT IS UNFORTUNATE THAT THE PRESIDENT'S STATEMENT, MADE IN AN EFFORT TO ADDRESS HIMSELF TO THE MISGUIDED CRITICISMS OF HIS DEFENSE AND ARMS CONTROL POLICIES, HAS BEEN USED TO OPEN UP A PANDORA'S BOX OF MISCHIEF WHICH IF UNCHECKED MAY ULTIMATELY REBOUND AGAINST THE NATIONAL SECURITY INTERESTS OF THIS COUNTRY.

WE MAY SOON REPEAT THE ARMS CONTROL MISTAKES OF THE 1970s. WE MAY UNILATERALLY INHIBIT OUR OWN WEAPON MODERNIZATION PROGRAMS IN ORDER TO CONFORM TO THE SPIRIT OF FLAWED ARMS CONTROL AGREEMENTS -- A SPIRIT THE KREMLIN NEITHER RECOGNIZES NOR SHARES. WE MAY FIND OURSELVES NEGOTIATING WITH THE SOVIETS FROM A POSITION OF RELATIVE WEAKNESS, WITH ALL THE DANGERS THAT IT INVOLVES.

AS I HAVE ALREADY SAID, I AM CONCERNED ABOUT ANY ACTION WHICH

MIGHT IMPLY AN ENDORSEMENT OF THE TERMS OF SALT II. I WOULD LIKE TO EXPLAIN BRIEFLY WHY I BELIEVE SUCH AN ENDORSEMENT WOULD BE A SERIOUS MISTAKE.

FIRST, SALT II WAS A POOR EXCUSE FOR ARMS CONTROL. I KNOW OF NO RESPONSIBLE COMMENTATOR WHO WOULD ARGUE OTHERWISE. THE BEST THAT CAN BE SAID FOR SALT II IS THAT IT WOULD HAVE PROVIDED FOR A REDUCTION OF SOME 250 LAUNCH VEHICLES FROM THE TOTAL SOVIET NUCLEAR ARSENAL. LITTLE IS EVER SAID THAT THIS REDUCTION WOULD INVOLVE OLDER, SINGLE WARHEAD SYSTEMS THAT SERVES MERELY TO DRAW OUR ATTENTION FROM THE MASSIVE GROWTH OF WARHEADS THAT WOULD HAVE BEEN ALLOWED UNDER THE TERMS OF THE ACCORD. AS MR. ANTHONY CORDESMAN RECENTLY NOTED IN HIS ARTICLE, "MEASURING THE STRATEGIC BALANCE: SECRETARY OF DEFENSE BROWN AS AN AMERICAN ORACLE": "...SALT II ONLY CHANNELED THE DIRECTION SOVIET FORCE IMPROVEMENTS COULD TAKE; IT DID NOT CONSTRAIN THE SIZE OR CAPABILITY OF SOVIET FORCES."

SECOND, SALT II WAS INEQUITABLE. POSSIBLY MORE DANGEROUS THAN THE MASSIVE FORCE BUILDUP ALLOWED UNDER THE TREATY WAS THE INEQUITABLE QUALITY OF ITS TERMS. THE TREATY PRESENTED THE IMAGE, BUT NOT THE SUBSTANCE, OF EQUALITY. THE EXCLUSION OF THE BACKFIRE BOMBER FROM THE "EQUAL" FORCE CEILINGS WAS ONLY ONE OF THE MORE GLARING EXAMPLES THAT DEMONSTRATED THIS CONFLICT BETWEEN IMAGE AND REALITY. THE SUBLIMIT OF 820 MIRVED ICBMS WAS ANOTHER CASE IN POINT. NOT ONLY WAS THE SOVIET UNION ALLOWED A MONOPOLY OF OVER 300 HEAVY SS-18 ICBMS, BUT THE SUBLIMIT WAS SET SO HIGH THAT ONLY THE SOVIETS COULD DEPLOY SUCH A LARGE NUMBER OF MIRVED ICBMS. WITH 550 MIRVED MINUTEMAN III MISSILES, AND NO MX UNTIL 1986, AT THE EARLIEST, THE PROPONENTS OF SALT II WERE PREPARED TO CONCEDE A DESTABILIZING ICBM WARHEAD ADVANTAGE TO THE SOVIETS.

THIRD, SALT II WAS NOT VERIFIABLE -- ADEQUATELY OR OTHERWISE. KEY PROVISIONS OF THE AGREEMENT, PARTICULARLY DEALING WITH QUALITATIVE, AS WELL AS QUANTITATIVE, CONSTRAINTS ON WEAPON SYSTEMS COULD NOT BE VERIFIED SOLEY THROUGH THE USE OF NATIONAL TECHNICAL MEANS (NTM). THIS CERTAINLY WAS THE CASE WITH RESPECT TO THE RESTRICTIONS ESTABLISHED

FOR THE DEPLOYMENT OF ONE NEW ICBM. TO COMPLICATE THE DIFFICULTY, THE U.S. WOULD HAVE ENDORSED IN SALT II A SIGNIFICANT LOOPHOLE ALLOWING FOR SOVIET ENCRYPTION OF MISSILE TEST TELEMETRY, THEREBY FURTHER REDUCING OUR ABILITY TO VERIFY THE TREATY. SALT II WOULD HAVE RELIED TO FAR TOO GREAT AN EXTENT ON TRUST IN THE WILLINGNESS OF THE SOVIETS TO COMPLY WITH ITS TERMS.

HAVING LOST THE FORMAL RATIFICATION BATTLE ON SALT II, MUCH OF THE ARMS CONTROL COMMUNITY HAS NOW ENDORSED A PROPOSED FREEZE ON THE TESTING, PRODUCTION, AND FURTHER DEPLOYMENT OF NUCLEAR WARHEADS, MISSILES AND OTHER DELIVERY SYSTEMS. DESPITE THE MOST FERVENT AND SINCERE HOPES OF THE NUCLEAR FREEZE ADVOCATES, SUCH A POLICY WOULD LOCK THE U.S. AND ITS ALLIES INTO A POSITION OF MILITARY DISADVANTAGE AND VULNERABILITY. A FREEZE WOULD, FOR ALL PRACTICAL PURPOSES, UNDERMINE THE U.S./NATO NEGOTIATING POSITION AT THE INF TALKS IN GENEVA BY REMOVING ALL INCENTIVE FOR THE SOVIETS TO NEGOTIATE MEANINGFULLY. A FREEZE WOULD NOT RESOLVE THE VULNERABILITY PROBLEM OF OUR ICBM FORCE, IT WOULD NOT PROVIDE US WITH AN EFFECTIVE REPLACEMENT FOR OUR AGING B-52 FLEET, IT WOULD NOT ALLOW US TO DEPLOY SURVIVABLE AIR LAUNCHED CRUISE MISSILES, AND IT WOULD NOT ALLOW US TO RESTORE THE NUCLEAR BALANCE IN EUROPE. IN SHORT, IT WOULD DO NOTHING TO ENHANCE THE SECURITY OF THIS COUNTRY OR ITS ALLIES.

IT IS TRUE THAT PRESIDENT BREZHNEV HAS PROPOSED HIS OWN VERSION OF THE NUCLEAR FREEZE TO DEAL WITH BOTH STRATEGIC AND THEATRE NUCLEAR SYSTEMS. THIS UNDOUBTEDLY, MAKES THE FREEZE ADVOCATES IN THIS COUNTRY UNCOMFORTABLE, AND IT SHOULD -- PARTICULARLY SINCE A SOVIET PLEDGE TO FREEZE DEPLOYMENTS OF SS-20 MISSILES HAS BEEN FOLLOWED BY EXACTLY THE OPPOSITE IN PRACTICE. WHATEVER THE MERITS OF THEIR PROTESTS THAT BREZHNEV'S FREEZE IS NOT THEIR FREEZE, THE FACT OF THE MATTER REMAINS THAT A NUCLEAR FREEZE, REGARDLESS OF ITS VARIATION, PLAYS INTO THE HANDS OF THE SOVIETS AND DOES SERIOUS DAMAGE TO THE U.S. NEGOTIATING POSITION IN THE INF AND START TALKS.

THE FACT THAT WE HAVE BEEN FRUSTRATED IN OUR PAST EFFORTS TO NEGOTIATE MEANINGFUL ARMS CONTROL WITH THE SOVIETS DOES NOT MEAN THAT WE SHOULD ABANDON THIS GOAL. WE HAVE A LEGITIMATE

INTEREST AND A REAL RESPONSIBILITY AND OBLIGATION TO SEEK EQUITABLE AND VERIFIABLE ARMS CONTROL AGREEMENTS. HOWEVER, THE SAYING THAT "ONLY A FOOL MAKES THE SAME MISTAKE TWICE" SHOULD GIVE US PAUSE AS WE EMBARK UPON ANOTHER ROUND OF NEGOTIATIONS WITH THE SOVIETS.

IN THE RESOLUTION, S. RES. 407, WHICH I INTRODUCED ON JUNE 9TH, I ATTEMPTED TO PROVIDE A REVIEW OF THE U.S. HISTORICAL EXPERIENCE WITH STRATEGIC ARMS CONTROL AND TO SPELL OUT THE BASIS UPON WHICH THE START NEGOTIATIONS COULD CONTRIBUTE TO U.S. NATIONAL SECURITY. I WAS PLEASED TO SEE THAT MANY OF THE PRINCIPLES EXPRESSED IN THAT RESOLUTION HAVE BEEN INCORPORATED IN A HOUSE RESOLUTION, H.J. RES. 538, INTRODUCED BY CONGRESSMAN BROOMFIELD. IN ADDITION, THIS HOUSE RESOLUTION HAS REPORTEDLY RECEIVED THE ENDORSEMENT OF THE WHITE HOUSE.

THE PRINCIPLES I STRESSED IN SENATE RESOLUTION 407 WERE DRAWN PRIMARILY FROM THE JACKSON AMENDMENT AS CONTAINED IN PUBLIC LAW 94-448. THESE PRINCIPLES INCLUDE THE FOLLOWING:

--MILITARILY SIGNIFICANT REDUCTIONS IN THE NUMBERS AND DESTRUCTIVE POWER OF BOTH SUPERPOWERS' NUCLEAR ARSENALS;

--REDUCTIONS TO EQUITABLE LEVELS OF FORCES THAT TAKE INTO ACCOUNT AN OVERALL ASSESSMENT OF STRATEGIC INDICATORS, INCLUDING MISSILE THROW-WEIGHT AND WARHEADS;

--VERIFIABLE REDUCTIONS THAT ELIMINATE OBSTACLES TO NATIONAL TECHNICAL MEANS OF VERIFICATION AND PROVIDE FOR COOPERATIVE VERIFICATION MEASURES, INCLUDING A GREATLY EXPANDED DATA BASE CONCERNING THE NUMBERS AND CHARACTERISTICS OF SOVIET WEAPON SYSTEMS, AS WELL AS ON-SITE VERIFICATION PROVISIONS;

--ENHANCEMENT OF THE SURVIVABILITY OF OUR NUCLEAR DETERRENT FORCES;

--PROVISIONS DEALING WITH THE DISMANTLEMENT OF EXCESS MISSILES; AND,

--THE PROMOTION OF ALLIANCE COHESION AND SECURITY WITHIN NATO.

PRESIDENT REAGAN NOW HAS THE DIFFICULT TASK OF TRANSFORMING THESE FUNDAMENTAL PRINCIPLES INTO A NEGOTIATING POSITION AND ULTIMATELY AN AGREED UPON TREATY. HE HAS ALREADY TAKEN THE FIRST STEPS IN THIS DIRECTION; THE START NEGOTIATIONS BEGAN ON JUNE 29TH. THIS ADMINISTRATION HAS SET ITSELF SEVERAL LOFTY AND COMMENDABLE GOALS UPON ENTERING INTO THESE TALKS. IT REMAINS TO BE SEEN WHETHER THE SOVIETS ARE PREPARED TO DEMONSTRATE THE SINCERITY AND GOODWILL TO MAKE THIS UNDERTAKING A SUCCESS.

THE CONGRESS TOO HAS A ROLE TO PLAY IN THIS PROCESS. IT IS NOT ENOUGH FOR US MERELY TO DEBATE THE MERITS OF A FINISHED PRODUCT UPON THE SUBMISSION OF THE PROPOSED TREATY TO THE SENATE. THROUGHOUT THE NEGOTIATIONS WE MUST BE PREPARED TO MAINTAIN OUR COMMITTMENT TO A PROGRAM OF STRATEGIC FORCE MODERNIZATION; THE SOVIETS ARE IMPRESSED ONLY WITH THE SUBSTANCE, NOT THE RHETORIC, OF STRENGTH. IN THIS REGARD, WE SHOULD SEEK TO CLARIFY OUR POSITION WITH RESPECT TO SALT I AND SALT II, PARTICULARLY AS THEY AFFECT OUR MODERNIZATION EFFORTS. FINALLY, GIVEN THE CRITICAL IMPORTANCE OF VERIFYING THE TERMS OF ANY AGREEMENT, IT MAY BE DESIRABLE FOR THE INTELLIGENCE COMMITTEE TO BEGIN A REVIEW OF U.S VERIFICATION CAPABILITIES AS THEY RELATE TO OUR START NEGOTIATING PROPOSAL AND THE LESSONS WE HAVE LEARNED FROM OUR EXPERIENCE WITH SALT.

IN CONCLUSION, I WANT TO COMMEND THE SUBCOMMITTEE FOR ITS EFFORTS TO EXPLORE THE CONSTITUTIONAL AND SECURITY IMPLICATIONS OF THE FOREIGN RELATION COMMITTEE'S ARMS CONTROL RESOLUTION, AND TO THANK YOU FOR THIS OPPORTUNITY TO TESTIFY.

[From Senate Report No. 97-493, Calendar No. 705, 97th Congress, 2d Session]

ADDITIONAL VIEWS OF MR. HELMS

The Joint Resolution with respect to nuclear arms reductions was marked up and ordered reported on June 9, 1982 by a vote of 12–5. I am correctly recorded as having voted in the affirmative; however, my vote was cast by proxy.

As a result of the unusual circumstances surrounding that vote, I must withdraw my support of the resolution. I will vote against it on the Floor as reported, and I urge my colleagues to do likewise.

The goal of nuclear arms reduction is one which I share. Indeed, I based my opposition to SALT II on the very fact that it failed to bring about real reductions, and locked us into a position of inferiority in crucial strategic areas. The notion that the United States is engaged in a nuclear arms "race" is absurd on its face when one examines the restraint which our nation has demonstrated over the past 15 years. There is only one nation which has constantly engaged in the development, production, and deployment of nuclear arms, and that nation is the Soviet Union. (See the charts which follow this section.)

We must stop the production of nuclear weapons now; we must go further and reduce the nuclear stockpiles now in existence. But we must do it in such a way that our safety and our freedom are not endangered during the period of reduction. However, the resolution reported from the committee will, in my judgment, undercut the goal of achieving verifiable arms reduction.

Unfortunately, the President's goal of START—the Strategic Arms Reduction Talks—has been countered by a Soviet-inspired disinformation campaign calling for a nuclear "freeze." The purpose of the freeze campaign is quite plain: To cast a chilling effect on U.S. strategic defense, both in our resolve and our deployment.

One can see that this campaign was begun less than two years ago, coopting the world peace movement to Soviet purposes. In the beginning, the activities of the world peace movement were scarcely reported in Pravda; but in more recent months, Pravda has reported on peace demonstrations at the rate of more than three a day. Not surprisingly, no demonstrations are reported within the Soviet empire; the attention is completely focused on the free world. This widespread activity has engaged the media in the United States, and even some national leaders who should be better trained in the principles of psychological warfare. The Committee's resolution is a response to the "freeze" movement, and is caught up in that insidious dialectic.

I therefore had doubts about the wisdom of participating in a debate which is being conducted on Soviet terms. Moreover, I have questions about START itself—not START as originally outlined by the President, but START as it emerged from the arms control bureaucracy in its technical dress. Despite the President's efforts to appoint senior officials in ACDA of unimpeachable merit and loyalty to the

President's program, no similar effort was applied consistently to second and third echelon positions. The technical premises of START, prepared by the arms control bureaucracy, need to be examined to see whether they are different from those of the Carter Administration, or even worse—a supposition not to be dismissed out of hand.

Despite the pronouncements of the President and former Secretary of State Alexander Haig that SALT II is dead, there is a persistent lobby for reviving SALT II with its fatal flaws, and implementing its provisions by the back door. This could be a fatal blow to our national security and freedom.

The record of the Soviets in violating their agreements is well known, and has been documented by competent authorities. It is only because of special political reasons and ideological unreason that this country has not made its case to the world on Soviet violations. Thus the case for a "freeze"—or even START—has to overcome formidable obstacles to be absolutely verifiable. Without such assurance, endorsing either concept would be an irretrievable step.

When the day for the mark-up of the resolution arrived—June 9, 1982, it was unfortunate that I was not able to be present in person for the discussion and final vote in the Foreign Relations Committee. I was distressed by both the alternatives offered, and there had been at least a dozen drafts of the resolution which was being offered in committee by the Chairman.

However, the mark-up took place at exactly the same time as the first day of mark-up in the Agriculture Committee of S. 2352, the Food Stamp Act Amendments of 1982, and related bills. As Chairman of the Agriculture Committee and author of S. 2352, I was obliged to preside over the Agriculture Committee, and could not attend the Foreign Relations Committee meeting.

Accordingly, I had delivered my proxy to the distinguished Chairman, Senator Percy, with instructions to uphold the Administration's position, and to defeat the various proposals calling for negotiations on a nuclear freeze. The Administration's proposals at least have the merit of ambiguity, and are infinitely preferable to the concept of a nuclear freeze which would lock in Soviet superiority.

In my opinion, the resolution reported from the Committee does not support the Administration's position as I understand it. Indeed, the resolution appears to attempt to ratify the SALT II treaty by mandating de facto observance of its provisions. Not only does this raise grave Constitutional questions—such as the issue of whether a treaty can be approved by a bare majority approving executive action—it also raises questions of the long-term survival of our strategic defenses.

The third of the resolving clauses states:

> To provide a basis for progress during the START negotiations, the United States shall continue to refrain from actions which would undercut the SALT I and SALT II agreements, provided the Soviet Union shows equal restraint.

The operative word in this clause is "shall," a word which mandates its provisions.

Previous drafts had used the word "should," a formulation which is merely precatory, that is to say, expressing a non-binding pious

hope. The word "shall" had not appeared in the previous drafs, not even in the one circulating the day before; but when the draft was presented to the Committee, the word "shall" had been mysteriously inserted. The drafts which I saw did not have the word "shall," nor did the Administration inform me that so significant a change had been made. It may be that even the Administration was not aware of the change, but the result was that I was misled when I gave my proxy to the Chairman.

Furthermore, the clause itself is misleading in that it purports to be based on President Reagan's statements. The fifth "whereas" clause, laying the predicate for the resolution, states:

> Whereas President Reagan has declared that the United States would continue to refrain from actions that would undercut existing SALT agreements as long as the Soviet Union shows equal restraint.

However, the President did not use the acronym SALT. What he actually said on May 30 at Arlington National Cemetery was the following:

> As for existing strategic arms agreements, we will refrain from actions which undercut them so long as the Soviet Union shows equal restraint.

The President's words were apparently chosen to be non-specific. The only "existing strategic arms agreement" at the present time is the Anti-Ballistic Missile Treaty of 1972, which comes up for review in October. Although it was negotiated and ratified in conjunction with the Interim Agreement on Strategic Arms Limitation, commonly known as SALT I, it is technically not part of SALT I. Indeed, it is of indefinite duration, whereas SALT I expired in October, 1977 and no longer has effect in international law.

SALT I, therefore, is not an existing strategic arms agreement, even though the United States and the Soviet Union issued supposed "parallel statements" in October, 1977 promising to observe the terms. The statements are not parallel because the U.S. promise was indefinite, whereas the Soviet promise was linked to the successful completion of a SALT II agreement.

Of course, a resolution of consent to the ratification of SALT II was never approved by the U.S. Senate. So legally no agreement exists. The only standing SALT II has in international law is the principle that the parties will not undercut the terms as long as there is a reasonable chance that it will be ratified. But SALT II has never been presented either to the Supreme Soviet or to the U.S. Senate, and there is no prospect that it ever will be. Indeed, the Administration has said that SALT II is dead. There is, therefore, no agreement.

Intentional or not, the "whereas" clause misrepresents the President's statement by converting a statement about the ABM treaty into support for SALT. But the resolving clause is even more misleading when it demands the observance of both SALT I and SALT II, both of them non-existent agreements, with the implication that this requirement is somehow based on the President's statement. In my view, the clause expresses exactly the opposite of the President's position. The staff which prepared the drafts of this resolution have ill served the Committee and the Senate.

But even if "shall" were changed back to "should," the whole episode casts doubt upon the utility of resolution. Its merits remain dubious. START itself needs much closer examination than the Committee has given it before endorsement is possible. In addition, the resolution is encumbered by extraneous issues with regard to accidental nuclear war, terrorism, and the Threshold Test Ban Treaty. These issues are not relevant to START.

Moreover, the Committee overlooked the introduction of S.J. Res. 409, by Senator Garn of Utah. Admittedly, it was introduced on the same day as the mark-up, but its details are explicit and its purposes sound. The Garn Resolution deserves closer attention. Accordingly, in the succeeding section, I offer my own analysis of the Garn Resolution and the other issues to which I have referred.

I. ANNEX

A. Comparison of U.S.-Soviet strategic force postures over 20 years: Unilateral restraint vs. steady buildup

	Soviet buildup
1963:	
U.S. unilateral deactivation of 100 Thor and Jupiter IRBMs deployed to Europe	Soviets keep 500 SS–4/5s, add 300 SS–20s
U.S. unilateral deactivation of 100 Shark GLCMs	Soviets keep 250 SLCMs
U.S. unilateral deactivation of about 2000 B–47 bombers	Soviets keep 700 Badgers
U.S. unilateral deactivation of 185 Atlas and Titan I ICBMs	Soviets keep 210 SS–7/8s until 1976, use as SALT I bargaining chip
U.S. unilateral cutback of 200 Titan II ICBMs	
U.S. unilateral cutback of 300 to 1,000 Minuteman ICBMs	Soviets accelerate SS–11/9 deployment in 1963, surpass U.S. ICBM total in 1969
U.S. unilateral cancellation of B–70 bomber and Skybolt ASMs	
U.S. unilateral reduction in air defense missiles and interceptors	Soviets keep 10,000 SAMs, 5,000 interceptors, modernize both
U.S. unilateral cutback in Polaris submarine deployment from 44 to 41 submarines	Soviets build over 62 SSBNs
Decision to freeze ICBM and SLBM deployment in 1967	Soviets keep adding new ICBM launchers, new SLBM launcher continue. Soviets add 1,000 new ICBM and SLBM launchers in 1969–77 period, after achieving parity in 1969.
1964:	
U.S. unilateral arms control reduction of U.S. enriched uranium and plutonium production	Soviets increase nuclear weapon plant capacity and production
1967:	
U.S. unilateral deactivation of 70 B–58 bombers	Soviets keep 100 Blinders
U.S. unilateral freeze in ICBM and SLBM deployment	Soviets keep building ICBMs, SLBMs
U.S. unilateral scale-down of ABM deployment plans	Soviet ABM program slightly cutback
1962–82:	
U.S. unilaterally deactivates 364 B–52s	Soviets keep 190 Bear and Bison bombers throughout the period, produce Bear variants into the 1970s

1972:	
U.S. ABM program reduced from 12 sites possible, 4 authorized, 2 under contruction, to only 1 site under construction	Soviets expand Moscow ABM in 1970s, and modernize
1973:	
U.S. ABM R&D cut drastically	ABM R&D increases after 1972, and continue at steady, active pace
1976:	
U.S. ABM site unilaterally deactivated	
1977–80:	
B–1 bomber unilaterally cancelled (240 aircraft cut)	Soviets mass-produce Backfire, 400 by 1985, three additional new bombers in advanced R&D
Initial operational capability unilaterally delayed four years for:	
MX ICBM (number of missiles and warheads also cut)	SS–19, SS–18, SS–17 fully deployed, five new ICBMs in advanced R. & D.
Trident submarine and SLBM (construction rate also cut)	Typhoon sub ahead of Trident, SS–N–8 operational since 1973
ALCM	New ALCMs, SLCMs in advanced R. & D.
GLCM	
SLCM	
ALCM unilaterally cancelled	
160 Polaris SLBMs unilaterally deactivated	Earliest Y, old G, and H retained
SRAM production unilaterally ended	AS–3, AS–4, and similar ASMs kept in inventory
400 Hound Dog ASMs unilaterally deactivated	
Minuteman III ICBM production line unilaterally dismantled	Over 4 ICBMs in mass production
Deployment of 100 Minuteman IIIs unilaterally cancelled	200 MIRVed ICBMs, 1000 warheads deployed per year since 1974, to continue through 1985
Mark 12A warhead proof-testing and deployment unilaterally delayed 3 years	
Underground nuclear weapons proof-testing and deployment unilaterally abandoned	Soviets test high yield warheads throughout 1970s
Minuteman II modernization unilaterally abandoned	
ABM R&D further reduced unilaterally	SS–13, SS–11 modernized
Further unilateral cutback in Patriot Air Defense missiles	Air defenses modernized
Proposed increases in Civil Defense rejected	Civil Defense steadily increases
ERW (neutron warhead) production unilaterally cancelled	Soviets already possess ERW
Lance I missile production unilaterally cancelled	Soviets deploy modernized FROGs, Scaleboard, SS–21, SS–22, SS–23
1,000 U.S. nuclear warheads unilaterally withdrawn from Europe	
120 SLBMs on 5 delayed Trident submarines unilaterally cutback	Soviets increase warheads targeted on NATO four-fold
2,600 ALCMs cancelled on 130 B–52s	Soviets use 1,320 MIRV/ALCM launchers by 1985 as a goal, accelerate SLBM MIRV program in 1975
960 ALMCs cancelled by not maximizing B–52 ALCM loading	Soviets deploy long-range AS–6 on Backfire
5,000 ALCMs planned for B–1 cancelled	

1981–1985:	
Deployment of 100 stockpiled Minuteman III ICBMs again cancelled	
Unilateral reduction in MX ICBM deployment from 200 to 100, only 36 to 40 of which will actually be installed	Soviets have over 100 mobile SS–16 ICBMs stockpiled, ready for immediate deployment
Unilateral deactivation of 52 Titan II ICBMs, carrying 33% of existing ICBM megatonnage	
Cut-back of planned construction of one more Trident submarine	
Unilateral deactivation of 80 B–52Ds, carrying 19% of our bomber megatonnage	
Unilateral reduction of ALCM yearly production rate from 480 to 440 per year	Soviets mass producing ASMs, ALCMs

B. U.S. UNILATERAL RESTRAINT, 1961–82

	Delivery vehicles deactivated	Warheads lost
IRBM's	100	100
SLCM's	24	
GLCM's	100	100
B–47's	2,000	4,000
Atlas, Titan I	185	185
Titan II's	200	200
Minuteman	300	300
B–70's	200	400
Polaris	48	48
B–58	70	70
B–5	364	1,456
B–1	240	5,000
MX	200	2,800
6 delayed Trident subs	144	960
B–52 ALCM carrier reduction	130	2,600
ALCM A cancellation		1,000
SRAM cancellation		1,000
Hound Dog deactivation		400
Polaris deactivation	160	160
Minuteman III cancellation	100	300
Tactical warheads NATO, not maximizing ALCM's on		1,000
B–52		960
MX further reduction	150	1,500
Titan II deactivation	52	52
Cut 1 Trident sub	24	192
B–52 D's	80	320
Total	4,871	25,103

II. THE GARN RESOLUTION IGNORED

On the day of the Senate Foreign Relations Committee's mark-up of arms reductions proposals, June 9, 1982, Senator Garn submitted the following S. Res. 407 to the Committee for its consideration. Unfortunately, the Committee report fails to mention or consider the Garn resolution. The text of the Garn resolution, S. Res. 407, is as follows:

> Resolution expressing the sense of the Senate with respect to negotiations between the United States and the Union of Soviet Socialist Republics on the reduction of strategic offensive arms.

Whereas the stated policy of the United States Government is to negotiate verifiable reductions to equal levels in the nuclear arsenals of both the United States and the Soviet Union;

Whereas the Congress has expressed its mandate in Public Law 92–448 that the United States should not enter into a nuclear arms treaty that provides for force levels inferior to those of the Soviet Union;

Whereas the Soviet Union has deployed the most destructive nuclear force known to man;

Whereas the Soviet Union deployed this force during a period of the strategic arms limitation talks (SALT) I interim agreement on strategic offensive arms and sustained negotiations on a follow-on SALT II agreement;

Whereas the Soviet strategic nuclear arms buildup threatens the survivability of the United States land-based intercontinental ballistic missile (ICBM) force, as well as significant elementals of the United States air-based and sea-based strategic nuclear deterrent;

Whereas the Soviet Union has consistently exploited the terms of the SALT I interim agreement on strategic offensive arms and the Treaty on the Limitation of Anti-Ballistic Missile Systems;

Whereas no arms control agreement is acceptable if its terms cannot be confidently verified;

Whereas national technical means of verification will likely prove inadequate to ensure compliance with a strategic arms reduction talks (START) agreement;

Whereas the Soviet Union has embarked upon a course of military and foreign policy adventurism which threatens world peace and undermines the process of improved relations of which arms control is an important part;

Whereas the SALT II Treaty failed to achieve those objectives of equality and verifiability necessary to secure the advice and consent of the Senate to its ratification;

Whereas the SALT II Treaty would have allowed for a significant buildup in strategic offensive forces and codified a state of Soviet nuclear superiority; and

Whereas the SALT II Treaty would have provided a poor foundation upon which to promote the national security objectives of the United States, enhance international stability, or negotiate equitable and verifiable reductions in the nuclear arsenals of both the United States and the Soviet Union:

Now, therefore, be it

Resolved, That it is the sense of the Senate that—

(1) the United States Government should enter into strategic arms reduction talks (hereafter in this resolution referred to as "START") with the Government of the Union of Soviet Socialist Republic as soon as the national security interests of the United States and world political conditions permit;

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(2) the objective of these negotiations should be the achievement of an agreement on verifiable reductions to equal levels in the nuclear arsenals of the United States and the Union of Soviet Socialist Republics; and

(3) any such future START agreement should—

(A) be based on the principle of true equality as expressed by the Congress in Public Law 92–448 and as determined by an overall assessment of strategic indicators, including missile throw weight and warheads;

(B) enhance the survivability of the nuclear deterrent forces of the United States;

(C) provide for the dismantling or counting under the force ceilings of missiles excess to those levels needed for maintenance and testing purposes;

(D) provide for cooperative measures of verification, including provisions for onsite inspection, to complement national technical means of certification and to ensure compliance;

(E) serve to promote the cohesion of the allies of the United States and to advance North Atlantic Treaty Organization (NATO) security; and

(F) enhance the goals of international stability and the national security interests of the United States.

SEC. 2. The Secretary of the Senate shall transmit a copy of this resolution to the President.

A. Analysis of the Garn resolution

Senator Garn's focus upon the "Jackson Amendment" to SALT I and the basis for judging SALT II and negotiating START is admirable. The Jackson Amendment contains the following key principles:

> The United States * * * desires a *stable* international strategic balance that maintains peace and deters aggression. The Congress supports the stated policy of the United States that, were a more complete strategic arms agreement not achieved within five years of the interim agreement i.e., by 1977, and were the *survivability* of the strategic deterrent forces of the US to be threatened as a result of such failure, this could jeopardize the supreme national interests of the US * * * The Congress recognizes the principle of US-Soviet *equality* reflected in the anti-ballistic missile treaty, and urges and requests the President to seek a future treaty that, *inter alia*, would *not* limit the US to levels of intercontinental strategic forces *inferior* to the limits provided for the Soviet Union * * **Congress considers that the success of the interim agreement and the attainment of more permanent and comprehensive agreements are dependent upon the preservation of longstanding US policy that neither the Soviet Union nor the US should seek unilateral advantage by developing a first strike potential.* (Emphasis added)

In fact, however, the Soviets have developed just such a first strike potential under SALT I, threatening the survivability of US forces. Thus, the success of the SALT I agreements must be judged negatively. Neither SALT I nor SALT II provided stability, US survivability, or equality, but instead codified US inferiority and a dangerous Soviet first strike potential.

In the "whereas" section of his resolution, Senator Garn accuses the Soviets of having "exploited" the terms of SALT I. In other contexts, the Senator has accused the Soviets of outright cheating and violations of SALT I. (See below for a discussion of Soviet SALT violations.) Senator Garn has also focused upon the need to link Soviet restraint in international affairs to further progress in arms control. He refers to the unequal provisions and the unverifiability of SALT II. He also states that SALT II would have codified Soviet strategic superiority.

In the resolved section of his resolution, Senator Garn has again usefully linked the US entry into START negotiations to Soviet good behavior in foreign policy. He again states that equality and verifiability be prime US START objectives, and he again refers to the "Jackson Amendment", Public Law 91–448. He mentions that true equality must include all strategic indicators, in particular, missile throw weight and warheads. Equally important, he argues that START must enhance the survivability of US deterrent forces, another key objective inherited from the Jackson Amendment. Finally, Senator Garn mentions the necessity of limiting Soviet stockpiled missiles usable for refire.

All of these objectives are laudable, and are fully consistent with the Jackson Amendment, the law of the land as US arms control objectives are concerned.

III. ANALYSIS OF REAGAN STRATEGIC AND ARMS CONTROL POLICIES

During the 1980 Presidential campaign, candidate Reagan advocated building a "margin of safety" in strategic nuclear force capability over the Soviets, and closing the "window of strategic vulnerability" which the Soviets have established over the U.S. since 1980. (In the Washington Post of December 14, 1980, former Undersecretary of Defense Perry confessed that in 1977 the Carter Administration grossly underestimated the rapidity of both Soviet MIRV missile deployments and accuracy improvements, thereby creating the 1980–1990 window of vulnerability.) Candidate Reagan also argued that the SALT II Treaty was "fundamentally flawed," permanently preserved Soviet strategic superiority, and was not verifiable.

The Republican Party Platform of July 1980 endorsed the following proposition:

> The foreign policy of the U.S. would "accept no arms control agreement which in any way jeopardizes the security of the U.S. or its allies, or which *locks the U.S. into a position of military inferiority*" (Emphasis added).

President Reagan reaffirmed this platform after his election. Moreover, in a public letter to the Coalition for Peace Through Strength of October 15, 1981, President Reagan stated: "I will sign the reso-

lution after it is passed by Congress" into the law of the land. Yet the above platform proposition and pledge is dramatically inconsistent with the proposed de facto ratification of the SALT II Treaty. President Reagan has also stated correctly that the Soviets now have strategic superiority over the U.S. Thus, de factor ratification of SALT II would legally enforce U.S. inferiority to the Soviets.

President Reagan also rejected continued U.S. unilateral restraint in strategic programs. In March, 1981, President Reagan stated that the Soviets have "sat on the other side of the Table so far, knowing that we have unilaterally disarmed to a great extent . . . maybe if we do a little building—it'll be a two way street."

But since the 1980 election, the Reagan Administration has failed to approve all but one strategic "quick fix" option which could close the window of vulnerability in the near term. The one option not rejected, deployment of 50 or 100 stockpiled Minuteman III ICBMs, was finally accepted after having been initially rejected because it would have violated the SALT II Treaty in 1983 or 1984.

Further, the Reagan Administration is unilaterally deactivating 52 ICBMs, 160 SLBMs, and 80 B–52D intercontinental bombers. These U.S. unilateral deactivations total 292 strategic intercontinental delivery vehicles which carry over 334 nuclear warheads, and over 26 percent of existing U.S. strategic nuclear firepower, or megatonnage. This U.S. deactivation is being done unilaterally, without even asking for any quid pro quo in Soviet arms restraint. Thus, instead of adding a "margin of safety," we are unilaterally deactivating the most powerful element of each leg of our strategic forces Triad. The Administration is unilaterally deactivating these 334 plus nuclear warheads prior to entering into Strategic Arms Reduction Talks (START) negotiations with the Soviets, which indeed would attempt to reduce nuclear warheads themselves as a key measure of strategic capability. Thus, it would appear that this U.S. unilateral deactivation is counterproductive. It does not enhance American bargaining leverage or Soviet incentive to negotiate. Why should the Soviets negotiate reductions in strategic nuclear warheads and missiles, when the U.S. is deactivating them unilaterally on the eve of the beginning of START negotiations, without even asking for a commensurate Soviet reduction?

The U.S. B–1B bomber, the MX ICBM, the Trident submarine and SLBM, the ALCM, and the SLCM strategic modernization programs which President Reagan announced in October 1981 are indeed laudable; but the most significant new programs, the B–1B and the MX, will not be initially operational until 1987 or later. The B–1B request was reduced from 250 to only 100 aircraft and the MX from 200 to only 40 deployed missiles. And the ALCM production rate has been reduced from 480 to only 440 per year. So there will thus be a 1980–1990 decade-long "window of vulnerability."

In late 1979, the Senate Armed Services Committee stated flatly that the SALT II Treaty was not in the U.S. national security interest, because it was deemed unequal, unbalanced, destabilizing and unverifiable. Candidate Reagan agreed with the Senate Armed Services Committee during the 1980 campaign. But President Reagan's recent 1982 Memorial Day speech committing the U.S. to unilateral compliance with existing strategic arms agreements raises ambiguities when compared with his campaign posture. President Reagan has also stated

that the U.S. cannot verify the number of warheads on Soviet missiles; but warhead limits on missiles are regarded by SALT II proponents as key constraints of SALT II. Indeed, the main element of the Administration's START proposal is a sharp reduction in warheads, yet by the President's own assessment, the U.S. cannot verify warhead limits (see section VI "START: Another Shake of SALT," for more details).

The following table illustrates Soviet strategic superiority in 1982, a superiority which will only increase in the years ahead. (The 292 U.S. strategic delivery vehicles and their 334 plus warheads planned for U.S. unilateral deactivation are taken out of U.S. forces. Soviet Backfire intercontinental bombers are included in Soviet forces.)

SOVIET STRATEGIC SUPERIORITY 1982

	U.S. forces	Soviet forces
Warheads	8,600	9,400
ICBM's	[1] 1,000	[2] 1,400
SLBM's	[3] 496	[4] 1,020
Intercontinental bombers	236	430
ABM's	0	[5] 32
Air defense missiles	0	12,000
Air defense interceptor aircraft	100	5,000
Antisubmarine subs	81	220
	Limited civil defense	Nationwide effective, civil defense
Total intercontinental delivery vehicles	1,732	2,850
Immediate strategic reserve	0	[6] 100
		[7] 200
Total		3,150
Long-term strategic reserve	0	[8] 1,300
Total		4,450

[1] 550 MIRV'd.
[2] 800 MIRV'd.
[3] 496 MIRV'd.
[4] 300 MIRV'd.
[5] Being modernized and increased to 100, plus nationwide breakout capability.
[6] Test and training ICBM's.
[7] Mobile SS-16 ICBM's.
[8] Stockpiled old ICBM's.

With respect to its arms control posture, the Reagan Administration has put itself in an unenviable position. The United States has allowed itself to be accused of an enormous strategic arms buildup, while at the same time stalling the opening of strategic arms negotiations. But as we have seen, the B-1B bomber, and the MX IBCM will only be available in 1987, and then only in reduced numbers, and Congress may budget so as to cancel or further reduce these programs anyway. Moreover, as noted, the United States is unilaterally deactivating 292 Polaris ICBMs, Titan II ICBMs, and B-52D bombers, which carry over 26 percent of our existing nuclear firepower or megatonnage. These are the most power elements in each leg of our strategic Triad that we are deactivating, yet we are not even asking for Soviet quids pro quo in arms restraint.

It would be a grave danger, therefore, for the United States unilaterally to comply with the unratified SALT II Treaty, which Candidate Reagan said was "fatally flawed," and which the Senate Armed Services Committee said was not in the U.S. national security interest.

Was not President Carter right, when he stated that the 1980 election would be a referendum on the SALT II Treaty? But now President Carter's fatally flawed SALT II Treaty has been put back in the running.

In fact, the alleged U.S. strategic buildup is stalled in Congressional micro-management and budget cutting. The Soviets have been talking about arms control agreements while relentlessly building up their own strategic forces, but accusing the United States of being the villain of arms control.

The tragic thing is that all of this need not have happened. Given the record of Soviet non-compliance with treaties, as well as its continuing unprecedented military buildup, it is the United States which really stands on the high moral ground in the arms control arena. In order to take advantage of the integrity of U.S. strict SALT compliance, it is long overdue for the United States to take the offensive in presenting the clear-cut evidence of Soviet circumventions and violations of arms treaties, and in insisting that any arms control treaties in fact be truly verifiable and unambiguous before the United States would even consider agreeing to them.

This is why the naive assumptions made by some advocates of a nuclear "freeze" must be examined. In particular, nuclear freeze advocates have not dealt realistically with the necessity of strict and complete verifiability of any "freeze" agreement. Without precisely agreed provisions and definitions providing for verifiability, "freeze" advocates are trusting in Soviet compliance with an international agreement—a dangerous assumption given the historical record of Soviet violations over the past 65 years. On a practical and historical level, the record is littered with treaties and agreements unobserved or broken by the Soviets.

The record of U.S. unilateral restraint in strategic programs is clear (See Annex). For just a few examples, the United States unilaterally froze its production of plutonium for nuclear warheads in 1964, in hopes of similar Soviet restraint. In 1967, the United States stopped building ICBM and SLBM launchers, and has frozen these forces at the 1967 level ever since, in hopes of stimulating Soviet restraint. Since 1969, the U.S. has unilaterally deactivated over 410 strategic delivery vehicles, and has cut back over 6,000 planned strategic warheads. In 1977, the U.S. cancelled the B–1 bomber, in hopes of stimulating Soviet restraint. In 1978, the U.S. cancelled the neutron warhead, again in hopes that the Soviets would restrain their strategic programs in response. But all of these U.S. unilateral restraints were ignored by the Soviets.

As former Defense Secretary Brown has explained, when the U.S. builds its strategic forces, the Soviets build. When the U.S. stops building, the Soviets build.

IV. TRUSTING SOVIET TREATY COMPLIANCE

An official U.S. State Department Soviet Affairs Note published in 1959 stated:

> Few nations can match the USSR in vociferous protestations of loyalty to international obligations. However, such declarations—which are typical of Soviet propagandists and

> scholars alike—diverge widely from actual Soviet practice. In the years since the Bolshevik Revolution the Soviet government, while consistently accusing others of bad faith in international dealings, has not hesitated to violate its own treaty obligations when such action appeared to be in its interest.

The fact that there have been many Soviet treaty violations is indisputable. The Soviets use international law, like warfare and subversion, as an instrument of policy. A Soviet international legal expert succinctly stated:

> Those institutions of international law which can facilitate the accomplishment of the stated tasks (of Soviet foreign policy) are recognized and applied in the USSR; those which contradict these aims in any way are rejected.

The above official 1959 State Department document authoritatively concluded that:

> The history of the last 40 years provided numerous examples of deliberate treaty violation by the Soviet regime. A cursory examination of the public conventions entered into by the Soviet Union during this period reveals well over *50 violations*. The USSR has disregarded treaty provisions inconvenient to itself, has unilaterally denounced conventions to which it was a party, has threatened abrogation as a means of intimidation, and has on several occasions attacked fellow signatories to treaties of friendship and nonaggression. (Emphasis added).

A. Soviet SALT violations

An advisor to President Reagan, Laurence Beilenson, stated in a recent book:

> We consider ourselves sagacious in staking our survival on treaties with the U.S.S.R., whose ideology blesses cheating as a virtue.

Analysis of Soviet compliance with Strategic Arms Limitation Treaties (SALT) has been complicated by the ambiguity of many of the provisions of the agreements. But this ambiguity was deliberately intended by the Soviets and is the direct result of Soviet negotiating deception to create loopholes to protect their strategic programs from constraints. Analysis of Soviet SALT compliance is also hindered by the well known ambiguity of U.S. intelligence data and judgments. But this ambiguity also stems largely from Soviet behavior. Since 1972, the Soviets have engaged in a massive camouflage, concealment, and deception program involving all Soviet strategic forces. This program has deliberately and clearly interfered with U.S. national technical means of verification. The harmful effects of Soviet camouflage, concealment, and deception can be recognized in the role it had in misleading U.S. intelligence estimates of both the basic Soviet ICBM and SLBM levels during SALT I. These were the key verification paramaters of SALT I, and U.S. intelligence miscounted both of them.

Thus the Soviets deceptively negotiate ambiguous SALT provisions, and then try to confound U.S. monitoring and analysis of their compliance behavior by throwing sand in our eyes. To add injury to insult, the Soviets often deliberately circumvent and even violate arms control treaties and other treaties. Nevertheless, the Soviets have had the gall to claim frequently that the U.S. should "trust" the Soviets to comply with SALT agreements.

The conclusion that the Soviets have violated SALT treaties not be surprising, however, when viewed against the background of the history of Soviet diplomatic behavior and treaty violations since the Bolshevik Revolution of 1917. Moreover, the conclusive evidence of Soviet negotiating deception throughout the SALT negotiations is indicative of Soviet compliance behavior. This pattern of negotiating deception, operational camouflage and concealment, and treaty violations is part of a much larger Soviet effort in diplomatic duplicity which involves propaganda, disinformation ploys, and "active measures" of covert action and subversion designed to totally defeat the West.

The record of Soviet non-compliance with arms control treaties suggests that evasion, circumvention, and violation are endemic to Soviet diplomatic behavior. The SALT negotiating and compliance record confirms that the Soviets have entirely different and hostile objectives in arms control which are fundamentally incompatible with those of the U.S. Thus the Soviets have found evasion, circumvention, and violation of arms control agreements to be in their interest, and have behaved accordingly. They have circumvented, evaded, or violated SALT agreements in order to further the shift in correlation of forces in their favor. Yet thus far the U.S. has failed to respond with compensatory strategic programs or even to challenge Soviet SALT violations. But Soviet peace propaganda has successfully obfuscated Soviet SALT cheating, and instead made the U.S. seem to be the main villain in arms control.

The Soviet Union is guilty of 20 to 35 reported violations of the SALT I ABM Treaty, SALT I Interim Agreement, SALT II, and other arms control agreements. The SALT violations "coverup" began under the Nixon Administration and was orchestrated by Dr. Henry Kissinger, who continued to perpetuate the coverup under the Ford Administration. It was continued and expanded under the Carter Administration, which extended the coverup to Soviet violations of SALT II. The Nixon, Ford, and Carter Administrations either suppressed these violations from the American people, or distorted or misleadingly presented them. The violations are as follows:

1. SALT I violations—ABM Treaty.—

Soviet Sam testing in ABM mode for SAM upgrade;

Soviet deployment of ABM Battle Management Radars for national defense;

Soviet ABM camouflage and concealment;

Soviet falsification of ABM deactivation;

Soviet creation of a new ABM Test Range without required prior notification;

Soviet development of a rapidly deployable, mobile ABM, also for nationwide defense.

2. SALT I violations—interim agreement.—

Soviet deployment of the heavy SS–19 ICBM as the replacement of the light SS–11 ICBM, which is the most dangerous of all Soviet SALT violations;

Soviet failure to deactivate old ICBMs on time, and falsification of official deactivation reports;

Bringing back ICBM equipment to deactivated ICBM complexes;

Keeping 18 SS–9 ICBMs at an ICBM test range, illegally operational;

Soviet deployment of IIIX silos with a configuration too similar to a missile-launch silo.

Soviet massive use of deliberate camouflage, concealment, and deception which actually increased after 1972;

Encryption of missile telemetry

Camouflage of ICBM testing, production, deployment

Concealment of SLBM submarine construction, berthing, dummy subs, berthing tunnels;

Constructing over 68 strategic submarines, when only 62 were allowed:

SS–20 IRBM deployment, which should count as ICBM deployment;

Violation of Brezhnev's pledge not to build mobile ICBMs;

Deploying SS–11 ICBMs at SS–4 MRBM sites, probably having a covert soft launch capability.

Keeping about 1,300 to several thousand old ICBMs stockpiled for both covert soft launch and rapid reload of silos for refire.

3. Other arms control violation.—

Over eight Soviet underground nuclear tests over 150 kilotons, in clearcut violation of the 1974 Threshold Test Ban Treaty. Several of these high yield underground tests are unambiguous violations;

Over 30 unambiguous Soviet ventings of radioactive debris from underground nuclear tests in clearcut violation of the 1973 Limited Test Ban Treaty. These ventings are all unequivocal, and resulted in the spread of radioactive debris outside of Soviet borders;

Inaddition to the Soviet Combat Brigade deployed in Cuba, Soviet deployment to Cuba since 1970 of Golf and Echo class submarines carrying long-range nuclear missiles, deployment of nuclear-capable MiG–23 fighter bombers to Cuba, deployment of long-range Bear bomber type aircraft capable of carrying nuclear bombs and missiles to Cuba, all in direct violation of the 1962 and 1970 Agreements Prohibiting Offensive Weapons and their support facilities in Cuba. This clearcut arms control violation is even more serious than SS–19 deployment.

The now confirmed April 1979 germ warfare accident at Sverdlovsk, indicating conclusive Soviet violation of the 1975 Convention banning germ warfare. Moreover, there is now also conclusive evidence of illegal Soviet use of biological toxins in Southeast and Southwest Asia. And the Soviets also have an intercontinental delivery capability for Biological Warfare (BW) weapons.

These clearcut Soviet arms control treaty violations are easily understandable, and all by themselves have graphically demonstrated the duplicitous Soviet approach to arms control. The State Department has directly accused the Soviets of violating the BW Convention. (In 1977, Soviet Foreign Minister Gromyko told the UN that BW weapons were "cruel and barbaric.").

4. *SALT II violations.*—

Soviet Typhoon SLBM encryption;
Reported Soviet camouflage of new submarines and ICBMs;
SS–18 Mod X ICBM encryption;
SS–NX–20 SLBM and SS–NX–19 SLBM encryption;
SS–20 IRBM encryption and deployment;
Continued stockpiling of SS–16 mobile ICBM's and deployment of up to 200 mobile SS–16s at the Plesetsk test range;
Soviet AS–3 Kangaroo deployment on Bear bombers;
Soviet AS–6 deployment on Backfire bombers;
Reported Soviet rapid reload/refire exercises for the SS–18 cold-launched ICBMs.

There has long been more than adequate evidence to challenge Soviet SALT violations. The shift in the strategic balance in Soviet favor, and U.S. advocacy of a minimum deterrence posture in which Soviet strategic advantages are deemed meaningless, are the principal causes for U.S. acquiescence in the Soviet SALT violations. Soviet circumventions and violations have shifted the strategic balance further in Soviet favor, which in turn has made it more provocative and dangerous for the United States to challenge these violations.

Ambassador Seymour Weiss, former Director of the State Department's Office of Political-Military Affairs, has succinctly explained the SALT compliance problem:

> Once a democracy has committed itself to a major, formal arms control treaty, a treaty seen as the linchpin of a broader policy of detente, finding the partner in violation of that treaty tends to undermine its own foreign policy. It amounts to an admission of past failure. Violations—and their political as well as military implications—must be explained to the electorate and to one's allies. This means that further arms control proposals will be difficult if not impossible to advance. The consequences are almost endless and all bad, from the point of view of those supporting arms control and those who insist agreements must be and in fact are verifiable. The violation must be made to go away. It did not occur, or if it did it was a passing aberration, of no military or political consequences, unworthy of open discussion. At all costs, the process of arms control must be protected. These are not overstatements. It is this pressure of political events that bears most heavily on verification, that causes even relatively clear-cut violations to be rationalized away. Unfortunately, our failure to confront the Soviets can only be interpreted by them in one way: as proof that the massive shift in the "correlation of forces" away from capitalism and toward socialism has left the leaders of the West no choice but to accommodate themselves to the Soviet position that no violations have occurred. This, in their view, is a "forced concession" caused

> by Soviet possession of superior power. The Soviet world view allows them no other interpretation of our acquiescence in the face of *overwhelmingly objective evidence that the Soviets have violated SALT and other arms control agreements* and the West has taken no action to repudiate or modify them. (Emphasis added.)

Amb. Weiss has thus answered the question of why the United States has not acted upon Kissinger's 1972 warning that the United States would abrogate if the Soviets were circumventing or cheating. Detente and continuing the SALT process are evidently more important than preserving U.S. national security.

Probably the most authoritative accusation of Soviet SALT violations ever made has been ignored. Ambassador Paul Nitze, who is now Chief U.S. Negotiator for Intermediate Range Nuclear Force Negotiations, was asked by Senator Zorinsky during Senate Foreign Relations Committee SALT II hearings in 1979: "Do you know of any violations that have come before the SALT I Standing Consultative Commission that were not resolved under SALT I?" Ambassador Nitze replied: "No, but how were they resolved? They were resolved by accepting what had been done in violation." Thus, Paul Nitze, one of our most knowledgeable and experienced SALT negotiators, has strongly bolstered the thesis that the Soviets have violated SALT agreements.

Roberta Wholstetter has also written that:

> The cheater in an arms agreement and the side cheated . . . both need to preserve the illusion that the agreement has not been violated. The British fear of an arms race (i.e., in the 1930s) so skillfully manipulated by Hitler, led to a (1935) naval agreement, in which the British . . . tacitly revised the Versailles Treaty. And British fear of an arms race prevented them from recognizing violations of the new agreement."

One significant Soviet SALT violation deserves analysis. Soviet military camouflage, concealment, and deception reportedly increased after SALT I negotiations began in 1969. Since SALT I was signed in 1972, the Soviets have enacted a massive camouflage, concealment, and deception program involving all Soviet strategic forces. This massive camouflage and concealment program was approved by the Politburo and Defense Council, and was coordinated with SALT negotiating deception.

But both SALT I and II state that "deliberate concealment measures which impede verification by national technical means" will not be used by either side. The Soviet program itself constitutes a violation of the provisions of both the SALT I and SALT II agreements which prohibit deliberately impeding or interfering with national technical means (NTM) of verification (reconnaissance satellites). This is because it has both deliberately and clearly interfered with U.S. national technical means of verification. This Soviet activity misled U.S. intelligence estimates of both the basic Soviet ICBM and SLBM levels during SALT I.

As even the Carter Administration State Department White Paper on SALT II verification of August 1979 stated: "Deliberate concealment efforts are themselves a violation, and if detected could be

grounds for abrogating the treaty, even if we are not certain what activity is being concealed . . . concealment measures designed to impede verification would themselves be violations . . ." Thus any Soviet concealment of strategic activity is a SALT violation, if we only can establish that it is deliberate.

The intentions underlying Soviet strategic behavior are among the most difficult intelligence questions to resolve. But there has long been strong evidence that Soviet camouflage, concealment, and deception related to their SALT-constrained strategic forces is deliberately intended to interfere with and impede U.S. national technical means of SALT verification. For only one example, in 1966 the Soviets published a "Dictionary of Definitions of Military Terms." This dictionary contained a definition of "maskirovka," the Soviet term for camouflage, concealment, and deception. Maskirovka included: ". . . creating deliberate interference with technical means of reconnaissance." (Colonel P. I. Skeybeda, ed., Dictionary of Definitions of Military Terms (Moscow: 1966), pp. 228–220.) This revealing definition of maskirovka appeared six years prior to the 1972 signing of SALT I, which precisely prohibited just such deliberate interference with NTM. Such a definition is surely still accurate.

Moreover, the Soviets have openly stated that they have long deployed concealed ICBM launchers, and they have even shown on Moscow television examples of some of them concealed as woodpiles. The Soviets evidently want the U.S. to believe that they have concealed ICBM launchers. Such concealed ICBM deployment completely circumvents all SALT I and II ceilings on launchers.

The Soviets have actually even had the gall to accuse the U.S. of deliberate concealment. This is tantamount to a Soviet accusation of U.S. SALT violation. The U.S. has not, however, engaged in deliberate concealment.

The status of SALT II compliance obligations on the Soviet side is ambiguous. Since early 1980, when President Carter ordered the SALT II Treaty's ratification to be suspended indefinitely, the Soviets have authoritatively stated several times that they are not bound to comply with SALT II until the U.S. ratifies it. Carter also committed the U.S. to unilateral compliance with SALT II, without even asking for a parallel Soviet compliance commitment statement. The U.S. restated again under the Reagan Administration that the U.S. will comply with SALT II as long as the Soviets do nothing to "undercut" it. Leaving aside the vague meaning of actions which undercut SALT II, unilateral U.S. SALT II compliance is unsatisfactory. Again, the Reagan Administration has failed to even ask for a Soviet parallel statement committing the USSR to a SALT II compliance policy pending SALT III negotiations.

First, the Soviets have all the benefits of U.S. compliance with SALT II, while themselves accepting none of the obligations. This situation is also illustrated by the fact that the Soviet government has issued no parallel compliance statement or SALT II compliance edict. Nor in two Administrations has the U.S. even demanded or requested a parallel compliance statement.

Second, on January 29, 1981, President Reagan criticized SALT II as being unverifiable as regards limits on Soviet warhead numbers, or

"fractionation." In the same press conference in which he called the Soviets liars and cheats, President Reagan said:

> There is no verification as to the number of warheads on (Soviet) missiles, no method for us to do this.

Thus President Reagan himself has stated that the U.S. cannot verify Soviet compliance with a key aspect of SALT II—warhead limits. And the Russians themselves have authoritatively declared that they will not comply with SALT II until the U.S. ratifies the Treaty. It is unrealistic for the U.S. to unilaterally comply with a treaty which we know the Russians will not comply with, and which we cannot verify. And Navy Secretary Lehman has stated that continued U.S. unilateral compliance with the SALT II Treaty is illegal, contradicting Section 33 of the 1961 Arms Control and Disarmament Act.

The Soviets have reportedly continued and even increased their missile telemetry signal encryption activities, despite SALT II provisions which require the accessibility of all telemetry needed by the U.S. to verify certain parameters. This continued encryption violates Article XV and its second Common Understanding. The new SSN–20 Typhoon SLBM is reportedly being encrypted almost totally, which actively interferes with U.S. ability to determine whether the Typhoon SLBM is a banned heavy SLBM. The Soviets are also reportedly almost totally encrypting the SS–18 Mod X, interfering illegally with the U.S. ability to determine the number, size, and type of warheads carried on it. Moreover, the Soviets reportedly are almost totally encrypting the telemetry on their SS–NX–19 SCLM. This encryption interferes with the U.S. ability to determine whether this SLCM has a prohibited range longer than 600 kilometers or carries multiple warheads. Finally, high levels of SS–20 encryption reportedly continue. This encryption hampers U.S. ability to determine whether SS–20 range is being extended or whether fewer warheads are being tested.

The reported Soviet stockpiling of over 100 mobile S–16 ICBM circumvents the SALT II provisions which ban SS–16 production and deployment. This action directly violates the Protocol to the SALT II Treaty. Moreover, up to 200 mobile SS–16s have been illegally deployed at the Plesetsk test range.

The most serious Soviet SALT II violations are their reported exercises testing a rapid reload/refire capability with their SS–18 ICBM. This activity completely circumvents all the SALT II ceilings on Strategic Nuclear Delivery Vehicles: 2250, 1320, 1200, and 820.

Another SALT violation deserves analysis. The Soviets made a false SALT II claim that they do not have cruise missiles with a range greater than 600 kilometers. This falsification is a unilateral advantage which has allowed them to exclude about 250 sea-launched cruise missiles and over 100 air-to-surface cruise missiles carried on the Bear bomber.

The deception and violation is confirmed by the recent DOD book, Soviet Military Power, page 61. This official source reveals for the first time that the Soviet AS–3 Kangaroo Air-Launched Cruise Missile (ALCM) has a range of "650" kilometers, and that it is carried on two variants of the Bear bomber.

Yet the Soviets officially stated in the SALT II Data Exchange of June 18, 1979 (an integral part of the SALT II Treaty), that they

had "zero" heavy bombers equipped for cruise missiles with range greater than 600 kilometers.

Thus there is an officially confirmed Soviet SALT II falsification, and the Soviets are in violation of SALT II by not counting their 105 Bear bombers in the 1,320 ceiling on MIRVs and ALCM equipped bombers.

It is especially ironic for the Soviets to have falsified the range of their AS–3 Kangaroo ALCM in 1979. For just two years earlier, on April 14, 1977, a Pravda editorial stated that: "Heavy bombers carrying cruise missiles with a range of more than 600 kilometers must be equated to MIRV missiles and accordingly entered into the established ceilings for such missiles." The Soviets evidently thus meant for only U.S. bombers equipped with long-range ALCMs to count under the 1,320 MIRV/ALCM bomber ceiling, but not their own.

Moreover, the Soviet Backfire bomber reportedly carries AS–6 air-to-surface cruise missiles with a range of 700 to 800 kilometers. Yet they also refuse to count these bombers in SALT II as well.

In conclusion, the Soviet record of noncompliance with existing SALT and other arms control agreements over the last decade has been widely and justifiably criticized. Due to the intensity and duration of the violations controversy, the U.S. public has naturally lost confidence in the integrity of the arms control negotiating process and in the integrity of U.S. enforcement of Soviet compliance with arms control agreements. Before further progress can be made in arms control negotiations with the Soviets, confidence in the integrity of the arms control process and its benefits must be restored.

If, however, the Soviet compliance record does not warrant respect, then it may be futile to resume negotiations. Moreover, there have reportedly been severe deficiencies in the quality of U.S. verification intelligence and compliance enforcement leverage.

B. Implications of the Soviet SALT violations

The Republican Party Platform of July 1980 explicitly accused the Carter Administration twice of a "cover-up" of Soviet violations of SALT I, II, and other arms control agreements:

> The Republican party deplores the attempts of the Carter Administration to cover-up Soviet noncompliance with arms control agreements, including the now overwhelming evidence of blatant Soviet violation of the Biological Warfare Convention by secret production of biological agents at Sverdlovsk . . . We pledge to end the Carter cover-up of Soviet violations of SALT I and II, to end the cover-up of the Soviet violation of the Biological Warfare Convention.

President Reagan himself criticized the bad Soviet SALT compliance record during the 1980 campaign. And, as Ronald Reagan *reaffirmed* in his first press conference after the election:

> I ran on the Platform; the people voted for me on the Platform; I do believe in that Platform, and I think it would be very cynical and calloused of me now to suggest that I'm going to turn away from it.

A serious, long-term cover-up has indeed occurred. Former Senator James Buckley, Senators Jake Garn and Gordon Humphrey, former

Defense Secretary Laird, and retired Chief of Naval Operations Admiral Zumwalt have taken the lead in exposing Soviet SALT violations and circumventions over the years.

The American people deserve to be told officially in at least general terms of the serious dangers already posed to U.S. national security by past Soviet SALT deceptions, violations and circumventions, and the extent to which they have been misled on Soviet SALT compliance and the negative effects of detente by past administrations.

But the U.S. has been, over the last decade, unable to enforce Soviet compliance with SALT and other arms control agreements. Our weak enforcement record and our failure to challenge between 20 and 35 reported cases of Soviet arms control non-compliance or circumvention has been due principally to the shift in the strategic balance against us. These Soviet violations are inconsistent with continued U.S. unilateral compliance with SALT I and II. Another factor has been the prevalence of minimum deterrence thinking among U.S. leaders. Unless we are to finally succumb to Soviet hegemony, there are compelling reasons that we now need to reverse the burden of proof in SALT compliance. The Soviets should be considered guilty of arms control violations unless they are willing to prove their innocence by providing complete data.

The Soviets have already gotten away with actions which the U.S. told them and the world in 1972 would result in our abrogation of the SALT I agreements. During the SALT I ratification hearings before Congress in 1972, top American leaders assured Congress that U.S. policy was that three specific Soviet SALT violations would not be tolerated. They stated that if the Soviets deployed heavy ICBMs to replace light ICBMs, produced mobile ICBMs contrary to a Brezhnev pledge, or constructed more than 62 strategic submarines, the U.S. would abrogate the agreements.

All the above Soviet violations and many others (reportedly 20 to 35) have nevertheless occurred. Yet the U.S. has still not protested these violations. Our abrogation threat was forgotten.

The Soviets should now be made to explain fully their reported 20 to 35 SALT and other arms control treaty violations or circumventions in the SALT Standing Consultative Commission established for this purpose, or in diplomatic and multilateral channels. They should also be made to understand that U.S. dissatisfaction with the record of Soviet arms control deception, violation, circumvention, and breakout potential will stand in the way of further progress in all arms control negotiations.

The most militarily dangerous Soviet SALT and arms control violations or circumventions are:

1. Widespread deployment of the counterforce capable SS–19 heavy ICBM, in addition to their authorized monopoly of 308 SS–18s.

2. ICBM stockpile, refire, and soft-launch capability, adding further to the counterforce threat. In addition, the Soviets have stockpiled and deployed clandestine mobile ICBMs and are deploying intermediate range mobile missiles which are easily convertible into mobile ICBMs.

3. Underground testing of high-yield nuclear warheads with increased counterforce potential;

4. Testing of air defense radars and missiles in an ABM mode, providing the breakout potential for a nationwide ABM defense;

5. Building new large ABM battle management radars and a rapidly deployable new ABM system, adding further nationwide ABM defense breakout potential; and

6. Maintenance of a confirmed biological warfare and intercontinental delivery capability.

7. The presence of Soviet offensive weapons in Cuba since 1970 (to include Soviet strategic submarines, intercontinental bombers, and fighter bombers and also their support facilities) is a direct, ongoing violation of the accords ending the 1962 Cuban missile crisis.

Altogether, these dangerous violations potentially give the Soviets both offensive and defensive breakout capabilities that cannot be offset by the U.S.

The backdrop of Soviet SALT deception, violations and circumventions has become so severe that fundamental "good faith" basis of all arms control negotiations has finally been called into question.

Challenge of Soviet noncompliance will improve the prospects for a serious renegotiation of SALT II on more equitable terms in SALT III talks. Compliance challenge will also provide strong justification for President Reagan's promised strategic force buildup required to reestablish the margin of safety needed for a secure, more stable world peace. Additionally, it will provide sound rationale for the increased intelligence collection and analytical assets needed to improve our national technical means of SALT verification. Finally and most significantly, by at long last insisting on early and complete Soviet SALT compliance, the U.S. properly and rightfully seeks to uphold the fundamental integrity of existing arms control agreements. The U.S. properly thus seeks to preserve the future viability and integrity of the entire arms control negotiating process. But this may ultimately be impossible in the face of massive Soviet treaty violations.

C. Soviet treaty violations

In conclusion, we also need to examine a brief and incomplete compilation of examples of Soviet diplomatic duplicity. The table below on Soviet treaty violations is notable for the fact that it is drawn from an official U.S. government document published in 1962. Other examples of Soviet forgeries, disinformation, and diplomatic deception are beyond the present paper's scope.

a. In 1973, the Soviets violated the 1972 Basic Principles of U.S.-Soviet Relations during the Yom Kippur War. In this case, the Soviets reneged on their 1972 pledge to engage in mutual consultations in the event that nuclear war was threatened, and they sought unilateral advantage by encouraging the Egyptian attack on Israel. They also threatened unilateral intervention against Israel, and made a nuclear threat against the U.S.

b. With Soviet aid and encouragement, North Vietnam broke the Paris Accords on Peace in Southeast Asia throughout the 1973–1975 period.

c. The Soviets also violated two arms control treaties in the 1920s and 1940s. According to Laurence Beilenson:

> There are * * * two cases where the Soviet Union abetted violations disarmament treaties. The Soviet Union was not a party to the Treaty of Versailles, but * * * it abetted the breach by Germany of its disarmament provisions, and helped Germany to defeat the provisions for verification of performance.
>
> The peace treaties of the wartime Allies—including the USSR and the United States—of 1947 with Rumania, Bulgaria, and Hungary each had clauses specifically limiting the military forces of each of the three countries, a disarmament provision. The clauses were not given even token performance. The breaches began and continued while the USSR dictated the conduct of the three countries.

d. High Reagan Administration officials have charged that the December 1981 imposition of martial law in Poland was directed by the Soviets, and that the Soviets have directly threatened military action against Poland, intimidated its leaders, and ordered basic human rights of the Polish people to be violated by the Polish Communist Party and Polish Army. Eugene V. Rostow, ACDA Director even went so far on NBC–TV on December 22, 1981, as to charge that the Soviets have violated the UN Charter by their aggressive actions in Poland. Other high Reagan Administration officials have also accused the Soviets of *violating* the 1975 Helsinki Accord by their suppression of the basic human rights of the Polish people.

e. Violation of the Litvinov Agreement.—In 1933, the U.S. recognized the government of the USSR following negotiations and an exchange of letters between Soviet Foreign Minister Litvinov and President Roosevelt. Litvinov stated in a letter to President Roosevelt of November 16, 1933:

> It will be the fixed policy of the *Government* of the Union of the Soviet Socialist Republics * * * not to permit the formation or residence *on its territory* of any group or organization which has an aim (of) the overthrow or the preparation for the overthrow of, or the bringing about by force, of a change in the political or social order of the whole or any part of the United States, its territories or possessions. (Emphasis added).

However, Foreign Minister Litvinov's solemn pledge produced no effect whatever upon the activities of the Comintern, which continued to carry out its role as the organizer and directing center of the World Communist movement from its Moscow headquarters. The purpose of the Comintern, clearly defined in its statutes and theses, was "the struggle by all available means, including armed forces, for the overthrow of the international bourgeoisie and the creation of an international Soviet Republic." Thus the Comintern, located in Moscow with the permission and aid of the Soviet government, was explicitly committed to overthrowing the U.S. government by force. Evidence of systematic violation of the Litvinov agreements after 1945 was brought to light by convictions under the U.S. Alien Registration Act of 1940, which made it a criminal offense "to organize or help to organize any society, group, or assembly of persons who, teach, advocate, or encourage the overthrow or destruction of any government in the U.S. by

force or violence." The trial and conviction in 1949 in a U.S. Federal Court in New York of 11 communist leaders, revealed that American Communist Party, acting upon orders of the USSR issued by Dmitri Manuilsky, (Comintern Leader and in 1949 Foreign Minister of the Ukrainian Soviet Socialist Republic and therefore an official member of the Soviet Government), had returned to a policy of violent revolution.

Despite continuous Soviet violation of the very agreements establishing U.S.-Soviet relations, the United States still seems to believe that the USSR is a nation capable of normal adherence to international law. Soviet propaganda, covert action, subversion, and espionage inside the United States has increased markedly over the last decade.

According to a new book by James L. Tyson, "Target America: The Influence of Communist Propaganda on U.S. Media," there are at least 4,000 active Soviet propaganda agents within the United States, spending over 240 million dollars a year on Soviet propaganda inside the United States. The Soviet activity is a blatant violation of the Litvinov Agreement, and in itself should make the USSR unfit to negotiate with on SALT.

f. Figure 8 reflects a number of other Soviet treaty violations. It is extracted from an official U.S. Government book entitled "Soviet Treaty Violations," Department of Defense, November 5, 1962.

FIGURE 8.—HISTORY OF MAJOR SOVIET TREATY VIOLATIONS

The agreement: May 7, 1920. Soviet regime signs treaty with independent Georgian republic, pledging no interference in Georgia's internal affairs.

The result: February 1–12, 1921. Soviet troops invade Georgia, in step leading to absorption of Republic into USSR.

March 16, 1921. In trade agreement with Britain, Soviet Union pledges not to engage in propaganda in that country.

May 26, 1927. Britain ends agreement because of Soviet violations, including failure to stop propaganda as promised.

June 5, 1922. Soviet Union concludes friendship agreement with Czechoslovakia.

June 29, 1945. USSR compels Czechoslovakia to cede Carpatho-Ukraine to the Soviet Union.

December 12, 1943. USSR and Czech government-in-exile sign treaty of friendship and mutual assistance.

February 25, 1948. Czechoslovak government forced to accept communist ultimatum, as USSR completes arrangements to force it into its satellite empire. Ultimatum compels appointment of a cabinet of Moscow followers and climaxes Soviet postwar drive to absorb once-independent Czechoslovakia.

December 17, 1925. USSR signs non-aggression and neutrality pact with Turkey.

March 20, 1945. USSR denounces this pact, begins campaign to secure control of Black Sea straits.

August 31, 1926. USSR concludes non-aggression pact with Afghanistan.

June 14, 1946. USSR forces Afghanistan to cede border territory of Kishka.

September 28, 1926. USSR makes non-aggression pact with Lithuania, later extending this agreement through 1945.

June 15, 1940. Soviet troops invade Lithuania.

August 3, 1940. Lithuania is annexed by Soviet Union.

September 27, 1928. Soviet Union adheres to Kellog-Briand pact for renunciation of war.

By 1939. USSR violates this pledge—40 invasions of Poland, Lithuania, Latvia, Estonia, Rumania, and Finland.

January 21, 1932. USSR agrees to non-aggression pact with Finland.

November 20, 1939. Soviet military forces invade Finland.

February 5, 1932. Soviet Union signs non-aggression pact with Latvia.

August 5, 1940. Latvia is forcibly incorporated into the USSR.

May 4, 1932. Soviet Union pledges non-aggression in agreement with Estonia.

June 16, 1940. Soviet military forces invade and occupy Estonia.

August 6, 1940. Estonia is annexed by USSR.

July 25, 1932. Soviet Union signs non-aggression pact with Poland.

September 17, 1939. Soviet troops invade Poland.

May 4, 1934. USSR–Poland extend non-aggression pact for 10 years.

September 29, 1939. USSR signs agreement with Nazi Germany to partition Poland.

June 9, 1934. USSR recognizes Rumania, guarantees its sovereignty.

June 27, 1940. Soviet army invades Rumanian provinces of Bessarabia and North Bukovina. Soviet occupation of these areas completed in four days.

September 15, 1934. USSR enters League of Nations pledging thereby "the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another."

August 23, 1939. USSR makes treaty with Nazi Germany, termed "a joint conspiracy to deprive Poland, Estonia, Latvia, Lithuania, Finland, and Rumania of their independence and territory integrity."

August 21, 1937. Soviet Union signs non-aggression pact with Republic of China.

October 2, 1949. USSR breaks relations with ROC after recognizing Communist Chinese regime it helped to gain power.

July 30, 1941. USSR concludes agreement with Polish government-in-exile pledging mutual aid and cooperation.

April 25, 1943. USSR breaks relations with Polish government-in-exile on pretext of Polish request for Red Cross investigation of Katyn Forest massacre.

August 14, 1945. USSR enters into treaty with Republic of China, containing these pledges, "each high contracting party undertakes not to conclude any alliance and not to take any part in any coalition directed against the other high contracting party. The treaty comes into force immediately and shall remain in force for a term of 30 years."

February 14, 1950. These pledges were broken when the USSR made a new agreement with Communist Chinese regime it had helped create. Soviets did not even bother to change the basic wording. The new treaty also pledged: "Both high contracting parties undertake not to conclude any alliance against the other high contracting party and not to take part in any coalition or actions or measures directed against the other high contracting party. . . . The present treaty will be valid for 30 years."

March 10, 1947. Council of Foreign Ministers, meeting in Moscow, agrees that all German prisoners of war should be repatriated by December 31, 1948.

August 3, 1955. Soviet regime furnishes West German Red Cross with data on the health and whereabouts of only 20 of the approximately 14,000 Germans known to be still held in the USSR.

May 4 & June 30, 1949. Four Power Agreements of New York and Paris guarantee U.S., British, French, and Soviet joint control of Berlin, all access routes to and from the city and freedom of movement within the city.

September 20, 1955. USSR unilaterally transfers Soviet control over all access routes to and from Berlin to East German regime.

August 13, 1961. Construction of Berlin Wall completely prohibits free passage from Soviet sector to the Western sectors.

July 27, 1953. Military armistice established between U.N. Command and opposing communist forces assisted by USSR, China & North Korea. Armistice agreement pledges signers to "cease introduction into Korea of reinforcing military personnel."

July 11, 1955. U.N. Command details long list of armistice violations by Communist parties.

May 6, 1957. U.N. Command, in another of series of official complaints, charges that Communists have sent troops into Korea's demilitarized zones six times in a period of less than four months.

January 14, 1956. USSR signs agreement with Yugoslavia, pledging $110,000.000 in credits for industrial construction.

August 4, 1956. USSR pledges an additional grant of $175,000,000, bringing total to $285,000,000.

May 28, 1958. Yugoslav sources disclose USSR has postponed for 5 years the grant to Yugoslavia amounting to $285,000,000. This represented an attempt to retaliate against Yugoslavia for its refusal to accept the CPSU's ideological leadership.

September 24, 1941. USSR pledges adherence to Atlantic Charter, which provides that agreeing countries seek no aggrandizement, that the countries desire no territorial changes not made in accord with freely expressed wishes of the people concerned, and that they respect the right of all peoples to choose their own form of government.

Against these promises stands the USSR's record of occupation and domination of Rumania, Estonia, Latvia, Lithuania, Czechoslovakia, Tannu Tuva, Afghanistan territory, Hungary, East Germany, Albania, Bulgaria, Poland, North Korea, Mongolia.

January 29, 1942. USSR, with Iran and Britain, signs treaty of alliance, providing for military use of Iranian territory only until end of military operations against Germany. Soviet Union refused to withdraw its troops from Iran at the end of World War II.

February 4–11, 1945. At Yalta Conference, USSR agrees on various postwar measures, including adoption of a resolution that the liberated peoples of Europe should have the opportunity to solve their economic problems by democratic means. East Germany, Hungary, and Czechoslovakia, and other countries which were forced into postwar roles as satellites of the Soviet Union.

February 11, 1945. USSR, at Yalta conference, agrees to declaration that Polish provisional government "shall be pledged to the holding of free and unfettered elections as soon as possible on the basis of universal suffrage and secret ballot.

January 5, 1947. Soviet Union refuses to participate in meeting with Britain and U.S. to secure compliance with the 1945 agreement pledging free elections in Poland.

January 19, 1947. Communist-controlled fraudulent election carried out under conditions of Soviet military occupation.

April 11, 1945. USSR signs 20-year treaty of friendship, mutual aid, and cooperation with Yugoslavia.

September 29, 1949. Soviet Union denounces this agreement.

June 14–18, 1945. President Truman and Premier Stalin agree, in an exchange of letters to "free access by air, road, and rail from Frankfort and Bremen to Berlin for United States forces."

April 1. 1948–May 12. 1949. USSR imposes the Berlin Blockade by severing all land and water routes between Berlin and West Germany. Western allies supply Berlin by airlift.

March 1962. USSR harasses flights by allied airplanes between Berlin and West Germany.

July 17–August 2, 1945. At Potsdam conference, USSR agrees that there should be uniform treatment of the German people throughout Germany. East Germany today continues to be a rigidly controlled Soviet satellite. Its people have been denied free elections. isolated from the people of West Germany, and victimized by the same kind of regimentation.

police rule, and economic restrictions imposed on the peoples of all the Soviet Bloc states in Europe.

October 19, 1956. USSR–Japanese Joint Declaration pledges the Soviet Union to refrain from interference in Japan's internal affairs.

1958. During the weeks preceding Japanese elections of May 22, Soviet radio beams propaganda at Japan violently opposing the reelection of Premier Kishi's government.

1959–1960. USSR threatens Japan with the possibility of nuclear war if Japan ratifies United States-Japan Security treaty, signed January 19, 1960.

Soviet noncompliance with treaties is now indisputable, as is the record of Soviet forgeries, deceptions, and disinformation ploys. How can the U.S. continue arms control negotiations with so unreliable a nation as the Soviet Union? Arms control treaties in any case can not be relied upon to keep the peace. Only adeqaute U.S. military forces will do that.

But as bad as Soviet treaty noncompliance actions have been, we also can not ignore Soviet words. As noted, Stalin said in 1913:

> Words have no relation to actions—otherwise what kind of diplomacy it it? Words are one thing, actions another. Good words are a mask for concealment of bad deeds. Sincere diplomacy is no more possible than dry water or wooden iron.

V.I. Lenin stated:

> Promises are like pie crusts, made to be broken.

The chief enemy of arms control is Marxism-Leninism. The Soviets are indeed waging ideological warfare through arms control negotiations. As Lenin also stated:

> Every peace program (i.e., such as a nuclear weapons freeze) is a deception of the people and a piece of hypocrisy, unless the principal object is to explain to the masses the need for a revolution.

As Laurence Beilenson concluded in his famous and authoritative book, "The Treaty Trap":

> The pattern of evidence (i.e. in modern history) is that treaties of disarmament have been broken by powerful nations . . . the central pattern is habitual unreliability in performance and recurring treaty reliance . . . (Treaties have) been only a formal recording of the then respective strengths of the parties making it, and (have) lasted only by reason of the continuence of such relative strengths, irrespective of the treaty.

As president John F. Kennedy stated on March 2, 1963 in regard to the Limited Test Ban Treaty then under negotiation with the Soviets:

> We know enough about broken negotiations, secret preparations, and the advantages gained * * * never to offer again an uninspected moratorium.

President Kennedy's admonition is probably the best approach to currently popular notions proposing an unverifiable U.S.-Soviet nuclear "freeze," or de facto ratification of the unverifiable SALT II Treaty.

V. FATAL FLAWS OF SALT II

Many expert analyses of SALT II have identified the following 10 "fatal flaws" of the Treaty:

The longstanding Soviet monopoly in heavy and very heavy ICBMs codified in the Treaty, including both the heavy SS–19 and the very heavy SS–18 ICBM.

The allowed growth under SALT II of the already overwhelming Soviet counterforce threat.

SALT II's failure to limit stockpiled Soviet missiles capable of rapid refire.

Exclusion from SALT II of the intercontinental Soviet backfire bomber.

SALT II's constraints on US ICBM survivability options, such as mobility and multiple aim points.

SALT II's unequal constraints on U.S. theater nuclear deployment options.

SALT II's failure to define a heavy ICBM and to achieve agreed baseline data on missile characteristics.

The failure to count under SALT II the mobile SS–20 IRBM, indistinguishable from and convertible into the mobile SS–16 ICBM, as an ICBM.

SALT II's failure to constrain Soviet test and training ICBM launchers, in which they have a huge advantage.

The unverifiability of many SALT II constraints. The United States can not verify the "new type" ICBM provisions, the range of cruise missiles, the upgrade of Backfire, Soviet ICBM warhead fractionation, rapid reload and refire capability, and stockpiled missiles.

Soviet spokesmen now are openly admitting that the U.S.S.R. has exploited the 1969–1980 decade of detente and SALT to mislead the West into complacency, while using the Western credits, trade, technology and grain derived from detente to pursue a relentless strategic buildup. Many top American leaders have also publicly conceded that Kremlin oligarchs deceived them in Moscow in 1972 on all the key issues of the SALT I agreements. Since as early as 1971, Moscow has been steadily outpacing America in the accumulation of military power, despite SALT negotiations. It is clear that an historic shift in the balance of military power occurred during the 1970s, the decade of detente and SALT, and the shift continues.

Far more significant even than the fatally flawed provisions of SALT II are the harmful effects of the Treaty and the SALT negotiating process upon the sound planning of U.S. strategic forces. SALT II has severely damaged American security.

Due to the SALT II negotiating process and to Carter Administration unilateral strategic cutbacks, the United States has forfeited well over 6,000 strategic nuclear warheads previously planned by the Ford Administration, and Carter has also cutback *710* strategic delivery vehicles.

In contrast, the Soviets already have over *1800* more strategic delivery vehicles than the United States, and have been adding over 1,000 new strategic warheads each year since 1974, an increase of over 6,000. They have already exceeded the United States in our previously last remaining advantage, number of warheads. Further, they will be able to legally add over *6,000 more* warheads to their forces by 1985 to achieve superiority even in warheads.

Before 1985, fully within the terms of SALT II, the Soviets can legally increase their already dangerous strategic counterforce capability and their strategic superiority. They can have over 14,500 mostly large counterforce warheads, compared to the preesntly planned U.S. total of only 11,900 mostly vulnerable small warheads. They will also have succeeded in excluding from SALT II second-line strategic forces *far more numerous* than their first-line forces, about 3,000 strategic delivery vehicles (some with multiple warheads) *unaccountable* in SALT II and unmatched by the United States.

Soviet public statements indicate clearly that they believe that the world balance of power (the "correlation of forces") shifted decisively in Soviet favor as early as 1971, a whole year before SALT I was signed.

In early 1979, the U.S. Joint Chiefs of Staff finally conceded ominously that the strategic nuclear balance had long ago shifted against America, because of the unrelenting Soviet strategic buildup after SALT I. Because of President Carter's cutbacks and delays in all our strategic programs, the JCS also warned that the strategic balance could not be improved by our delayed MX, ALCM and Trident strategic modernization programs until the mid-1980s.

In February 1980, General Ellis, Commander of the Strategic Air Command, finally echoed the ominous JCS warning with an even more grim revelation. Ellis testified to the Senate that since 1977 we have lost strategic "essential equivalence" to the Soviet Union. But essential equivalence itself has long been recognized by most experts as a euphemism for the American strategic inferiority that has existed through the last 8 years under SALT I. So General Ellis, too, was conceding long-standing American military inferiority to the Soviets.

In January 1980, the JCS predicted more soberly that we will not be able to restore strategic parity until the late 1980s. More pessimistically, General Ellis believes that parity cannot be restored by as late as 1990, even after our planned MX, ALCM and Trident modernization programs are fully deployed.

American strategic inferiority thus has long been an unfortunate reality. It manifests itself in several forms, one of which is vulnerability.

Both the U.S. SALT I unilateral statement of May 9, 1972 and the Jackson Amendment to SALT I made it clear that enhancing the survivability of U.S. strategic forces was to be the fundamental, paramount U.S. goal in seeking a SALT II Treaty. As Senator Jackson precisely stated in regard to SALT I: "The intent of the (SALT I) agreements is to enhance our security by enhancing the survivability of our deterrent." Yet SALT I has allowed U.S. strategic vulnerability to become unprecedented. SALT II has again failed to solve the problem of maintaining survivable U.S. strategic forces.

Beyond American numerical inferiority, Soviet strategic forces of 1980 have already opened a "window of vulnerability" on all U.S. strategic forces, and this window will gape open all the wider throughout SALT II. The SALT process itself has contributed to U.S. strategic vulnerability by offering the false promise that somehow the Soviets would agree to limit their threat to American land-based missiles. Meanwhile, while vainly hoping that the SALT process would solve our ICBM vulnerability problem by encouraging Soviet restraint, we failed to unilaterally solve our own problem through either mobility, active defense, or proliferation of aim points. Now the adverse strategic and military trends against us are unmistakable, and will surely make the 1980s a perilous decade for Americans. The "window of vulnerability" once again leaves America open to Soviet nuclear blackmail, as in the period of Khrushchev's rocket rattling in the 1950s and early 1960s.

A. Analysis of the Ten Fatal Flaws of SALT II

There are at least 10 flaws in SALT II, each of which by itself was fatal to the Treaty's ratification. Each fatal flaw will be analyzed and explained in sequence in order of its importance.

The most serious flaw allows the Soviets to neutralize the credibility of the entire U.S. strategic deterrent posture by merely continuing to build the capability for threatening to destroy most U.S. strategic forces in a counterforce first strike. It also entails failure to achieve the equal force levels, including throw-weight, called for by the Jackson Amendment to SALT I.

First, SALT II preserves the existing gross inequalities favoring the U.S.S.R. in both "very heavy" and "heavy" intercontinental ballistic missiles (ICBMs), as measured by their throw-weight (or payload). By exploiting MIRV (multiple, independently targetable reentry vehicles) technology and equalling the United States in accuracy, the Soviets have dangerously translated their huge throw-weight advantage into massive counterforce capability for threatening the complete destruction of all our land-based missiles, bombers, and in-port submarines in a first strike.

SALT I already granted the Soviets superiority in number of missiles and throw-weight since 1972. SALT I also legally allowed the Soviets a monopoly in very heavy missiles. But the Soviets are granted the same exclusive right to have very heavy SS–18 ICBMs again under SALT II lasting through 1985. In SALT II the United States is again forbidden to have any very heavy ICBMs whatsoever. The Soviets thus have a permanent monopoly on very heavy ICBMs. We have thus conceded for the second time in eight years the principle that we can be legally inferior to our most dangerous adversary in a decisively significant military capability.

The Soviets will also have a de facto monopoly on heavy SS–19 sized ICBMs until 1986, throughout SALT II. These U.S. concessions are already being perceived world-wide as continued U.S. acquiescence in Soviet strategic superiority.

The Soviet SS–18 force of super missiles alone, all by itself, carries more megatonnage or explosive power than the combined total of all U.S. land- and sea-based ballistic missiles. This is a measure of the enormous military significance, and therefore the geopolitical weight, of granting a monopoly on SS–18s to the Soviets.

The Soviet SS–19 force of heavy ICBMs is almost equally formidable. The SS–19 force too can destroy most U.S. strategic forces in a first strike all by itself.

It should be no comfort to Americans that under SALT II the Soviets now have two, independent, first strike forces, one composed of 308 SS–18s, and another made up of about 400 SS–19s. Thus the Soviet monopoly on very heavy SS–18 super missiles, together with their nearly as lethal monopoly on heavy SS–19 missiles, will neutralize the deterrent effect of U.S. strategic forces. These combined forces are simply a measure of the gravity of the Soviet threat endangering strategic stability. But the Carter Administration argued incredibly that since the SS–19 force is almost as deadly as the SS–18 force, we somehow need not worry about either.

The Carter Administration also argued that the Soviet heavy ICBM monopoly does not matter, because the U.S. military has never desired to have heavy ICBMs. This argument is incorrect for four reasons. First, heavy ICBMs are in fact militarily useful, because they can be used to threaten the other side's military forces. Second, from 1960 through 1963, the U.S. Air Force planned to deploy 250 Titan I and Titan II heavy ICBMs. This is a militarily significant number. But a civilian, Defense Secretary McNamra, cut these plans back to only 54 Titan IIs. Third, as late as 1970, even Dr. Henry Kissinger wanted to maintain the right for the United States to have 250 heavy ICBMs in the SALT I agreement then under negotiation. Of course, Kissinger later conceded on this point in May 1972 and the Russians were allowed over 300 heavy ICBMs in SALT I to none for the United States. Finally, the U.S. MX ICBM was designed in 1973 by the Air Force to be a very heavy throw-weight ICBM. All these facts contradict the Carter Administration claim that the U.S. military has never wanted heavy ICBMs.

These unpleasant facts mean that our strategic forces are now being "checkmated." Aggressive Soviet behavior all around the world demonstrates that our deterrent forces are already in the process of being neutralized politically and this will increasingly erode deterrence at intercontinental, theatre nuclear, and conventional levels. Our nuclear umbrella intended for extended deterrence, vital to the security of NATO, our allies in the Middle East, and Japan, is steadily losing credibility. Even Dr. Kissinger himself has recently conceded the geopolitical significance of Soviet counterforce superiority.

In effect, within the terms of SALT II, we are allowing the Soviets to build with impunity precisely the numbers and types of strategic weapons which will enable them to completely defeat our entire deterrent strategy. Thus, the Soviets can threaten nuclear blackmail in order to further their aggressive aims.

As if the existing Soviet SS–18 and SS–19 heavy ICBM forces were not bad enough, the second and even more dangerous fatal flaw of SALT II also deals with counterforce. SALT II allows the already overwhelming Soviet ICBM counterforce threat to grow even further. This counterforce growth is permitted by several loopholes in SALT II's provisions.

The Soviets can reasonably be expected to maximize their warhead capabilities by legally putting ten multiple, independently targetable

re-entry vehicle (MIRV) warheads on each of their allowed 820 SS–18, SS–19, and SS–17 MIRVed ICBMs—giving them an allowed total of 8,200 highly accurate counterforce warheads. The Soviets can thus upgrade their heavy SS–19 force from six to ten MIRVs each, and their SS–17 force from four to ten MIRVs each.

Moreover, there is no agreement in the Treaty on the specific launch-weight and throw-weight data necessary to define a heavy ICBM, thereby allowing Soviet deployment of many more heavy ICBMs. (This point will be addressed in more detail below.)

Further "new type" Soviet ICBMs are not really limited. Despite the lessons of SALT I, there is also no agreement on the specific missile qualitative characteristic baseline data necessary to measure and verify the allowed increases in missile throw-weight, launch-weight, and volume, and also, silo volume. The SALT II constraints on "new type" ICBMs are too imprecise to be meaningful. These loopholes, together with the allowed encryption (or encoding) of Soviet missile telemetry signals, make it clear that there are no effective constraints on "new type" Soviet missiles. Thus, with one of their new missiles already legally exempted, the Soviets will be able to legitimately deploy all five of their new missiles known to be under development.

This "new type" deployment will provide even greater counterforce capabilities than the existing SS–18 and SS–19 forces, which are already devastating. Despite Carter Administration claims that the factionation (MIRVing) limits of SALT II comprise effective constraints, the Soviets will be able to greatly increase their ICBM warhead number under SALT II. They can add over 6,000 ICBM warheads legally under SALT II, which cannot be construed as restraint.

The third fatal flaw deals with the famous Backfire bomber. The intercontinental-ranged, refuelable Soviet Backfire bomber is not counted in the Soviet strategic delivery vehicle aggregate of 2250. But all U.S. intelligence agencies agree that Backfire has the unrefueled range to strike all of the United States on a one-way mission. Range is the key criterion for SALT purposes. Indeed, the Backfire has better range than the oldest variants of the U.S. B–52 and all Soviet Bison bombers, which are counted.

Range is the most important SALT criterion for bombers because all U.S. B–52 bombers are programmed for one-way (or range) missions against the U.S.S.R. Thus, Backfire's one-way mission, intercontinental range capability, should cause it to count in SALT II like all U.S. B–52s, which also have one-way, range missions.

But Backfire also has refueling capability and sufficient tankers are available for it. With refueling and Arctic basing, Backfire can even strike the United States and return to the U.S.S.R. on a round trip radius mission, which gives it better capabilities than most U.S. bombers.

Further, the upgrade of Backfire's already intercontinental range capabilities is totally unverifiable. The Soviets have spurned all of our attempts to limit Backfire range upgrade, and also constraints on basing and operations.

Additionally, even 220 unflyable, mothballed U.S. B–52s count in SALT II, but all 400 eventual Backfires, 220 Soviet bomber variants (and 1300 Soviet stockpiled missiles) do not count. These Soviet exemptions are totally inequitable.

Finally, due largely to Soviet insistence on excluding Backfire, there is no clear, equitable definition of a heavy bomber in SALT II. But there are three additional "new type" Soviet heavy bombers already known to be under development, whose status, under SALT II, is recklessly left unclear. The status of these new Soviet bombers will require further negotiation in the Standing Consultative Commission for determination of whether or not they count. But our negotiating leverage will be greatly weakened by the precedent of Backfire's exclusion.

To add insult to injury, the Soviets have falsely told us that they will not give Backfire an intercontinental or refueling capability, but we know it already has both. Such blatant falsifications are clear indications of Soviet duplicity.

The strategic significance of not counting Backfire in SALT II is that this force alone can deliver about 30 percent of the present huge Soviet megatonnage advantage, making Backfire a formidable second strike force. This inequity is compounded by the fact that the United States has no effective air defenses against Backfire. Hence all Soviet bombers would have a "free ride" against the United States.

The fourth flaw, which also will be analyzed in more detail below, relates to how SALT II hinders solution of our prime strategic problem. SALT II constrains all U.S. options to make our land-based missiles survivable. Such options as the "shell game" or "dense pack" multiple protective structure (MPS) deceptive basing mode, or truck mobility for our ICBMs are either temporarily or permanently precluded, despite the allowed growth of the already alarming Soviet counterforce threat. SALT II bans both additional fixed ICBM launchers or their relocation, and also mobile ICBMs. These restrictions are due to the Treaty's too restrictive definition of what constitutes a fixed ICBM launcher, combined with the constraints on mobile ICBM deployment in the Protocol. The U.S. conceptual designs for the canisterized MX missile do not sufficiently distinguish the moveable canister from its fixed, multiple protective structure. The MX is either a mobile ICBM, in which case the Protocol bans its deployment, or it is launched from multiple fixed positions, in which case the additional or relocated fixed positions are banned.

Further, Soviet leaders have already given us an arrogant ultimatum that the new U.S. MX ICBM is unverifiable and inconsistent with SALT II deployed in any basing mode. Despite their arrogance, the Soviet interpretation of SALT II is reasonable. Moreover the Soviets have already challenged our MX even though MX will not be deployed until 1989, well after the Treaty expires. These SALT II constraints on U.S. ICBM options are destabilizing, especially in view of the allowed growth in Soviet counterforce capability.

The fifth fatal flaw also relates to unequal constraints on U.S. options, and this too will be treated in more detail below. The SALT II Protocol contains unequal constraints on new U.S. long-range weapons for the NATO theater. U.S. ground- and sea-launched, long-range cruise missiles—GLCMs and SLCMs—now under development are constrained and cannot be deployed until after 1981. But a huge Soviet buildup in SS–20 intermediate range ballistic missiles, and other medium- and short-range theater nuclear missiles and fighter-bombers, is totally unconstrained.

This massive Soviet theater strategic buildup against Europe began years ago and is still ongoing. There is no end of the Soviet buildup in sight. It is inequitable for U.S. theater deployment options to be constrained, but not comparable ongoing Soviet deployment programs. Moreover, these constraints on U.S. cruise missiles are still negotiable in the proposed SALT III negotiations, and could well establish a permanent precedent, particularly in light of the fact that ratification of SALT II would put the United States in a grossly inferior position from which to bargain in all future arms control negotiations.

Sixth, it is significant that SALT II limits only launchers, but not missiles or nuclear warheads themselves. The Treaty fails to control the production of all types of missiles and their warheads. Further, the stockpiling of missiles is not banned. Hence stockpiled missiles and extra warheads are fully legal and could easily be used for refire. Moreover, rapid reload and rapid refire capabilities are inadequately defined and constrained. The recent Soviet testing of a rapid reload and rapid refire capability with their SS–18 reported Aviation Week (22 September 1980, p. 14) is not only a clearcut violation of the terms of SALT II, but it also illustrates well the danger of the huge Soviet missile stockpile (over 1300 ICBMs) allowed under SALT II. Moreover, even counting only launchers, the United States faces a huge disadvantage under SALT II. The Soviets have 785 more launchers now.

Seventh, there is still no definition of a heavy ICBM in SALT II. The most surprising and significant fatal flaw in SALT II is the continued Soviet refusal to agree to a definition of a heavy ICBM. This is a loophole of major proportion. Soviet refusal to agree to specific, precise provisions indicates that they are protecting dangerous new heavy ICBM programs. It is ironic that this failure to define a heavy ICBM is also widely recognized as the single most significant flaw of SALT I in 1972 and again of SALT II through Vladivostok in 1974. This SALT II failure to define a heavy ICBM is especially dangerous because it means that other "new type" Soviet ICBMs could be even larger and more deadly than their famous heavy SS–19. The Soviets could also increase the size of the SS–18 follow-on, and because there are no agreed SS–18 baselines, the burden would be on the U.S. to prove violations.

The Carter Administration claimed that a U.S. unilateral statement not contradicted by the Soviets is somehow agreed. This is precisely the status of the heavy ICBM definition in SALT II. The United States on August 16, 1977 unilaterally provided U.S. data on the launch-weight and throw-weight of the Soviet SS–19 ICBM in an attempt to define the parameters of a U.S. heavy ICBM. This was also an attempt to define a heavy ICBM for both sides. The Soviets, however, did not agree. They did not even respond. The Carter Administration evidently believed that this is another strange case in which Soviet "non-contradiction" constitutes agreement, because despite the facts the Administration nevertheless claimed that there is a "clear, agreed" definition of heavy ICBMs. But this non-agreed heavy ICBM definition must be deemed even weaker than the more explicit and positive U.S. SALT I unilateral heavy ICBM definition of 1972. In 1972, we at least told the Soviets that we would regard any new ICBM

significantly larger than their SS–11 to be a violation of SALT I. We have said nothing similarly positive in SALT II. No good corporate lawyer negotiates key aspects of any commercial contract on this kind of "assent by silence" basis. It is obvious that Soviet silence can always be broken with impunity with grave consequences for the United States. Moreover, the Soviets have already told us repeatedly that they would not be bound by U.S. unilateral statements, emphasizing the unreality and danger of U.S. trust in the strange diplomatic device of "non-contradiction."

Eighth, about 250 mobile Soviet SS–20 intermediate range missile launchers are capable of launching intercontinental missiles, and they have reportedly launched mobile SS–16 ICBMs. The provisions of the Treaty state clearly that any launcher which has launched an ICBM is defined as an ICBM launcher. These Soviet mobile SS–20 launchers therefore explicitly should count. But inexplicably, none of the 250 SS–20 mobile launchers count, although they are capable of being quickly loaded with stockpiled SS–16 ICBMs and then launching them. And a large number—about 100—of SS–16 mobile ICBMs are known to have been already produced and stockpiled, making them readily available for rapid launch by SS–20 launchers.

Ninth, the Soviets are allowed to preserve and even increase their already huge advantage in so-called "test and training" missile launchers which do not count, even though these launchers are known to be part of their operational missile force. For example, the Soviets maintained 18 SS–9 Fractional Orbital launchers at a test range for years under SALT I, but these ICBMs did not count. The Soviets reportedly have over 100 test and training launchers which still do not count in SALT II, a significant number.

The tenth fatal flaw relates to the least important issue, verification. Like SALT I, SALT II fails to prevent the already massive, nationwide Soviet camouflage, concealment, and deception program from growing further, and from continuing to hinder U.S. intelligence monitoring and verification. This Soviet program reportedly grew in scope and scale under SALT I, despite the fact that it was deliberate and was, therefore, a violation. Soviet camouflage, concealment, and deception has clearly already hindered verification. The recent losses, compromises, funding reductions, and withholding in U.S. intelligence collection capabilities, coupled with the more difficult to monitor qualitative constraints of SALT II and the allowed encryption of Soviet telemetry, altogether make SALT II largely unverifiable. For example, we cannot verify the "new type" ICBM provisions, the range of cruise missiles, the upgrade of Backfire, Soviet ICBM fractionation, rapid reload and refire capability, stockpiled missiles, with anywhere near "adequate" confidence.

Any one of these ten fatal flaws in SALT II impairs U.S. national security, and each was cause enough for the Treaty to be voted down in the Senate. Combined, they clearly have made the Treaty unequal, unbalanced, destabilizing, largely unverifiable, and harmful to our NATO, Middle East, and Asian allies.

B. Salt II in balance

In sum, before 1985, the Soviets can easily achieve a warhead superiority of at least 14,500 to the U.S. planned total of 11,900 warheads, and surpass U.S. missile accuracy, full within the terms of the SALT

II Treaty. Again, they will have overwhelming throw-weight, megatonnage, and counterforce advantages. But the Soviets have excluded significant forces from SALT II. The Soviets can still keep 400 Backfire bombers, about 350 old submarine launched ballistic and cruise missiles, about 220 intercontinental bomber variants, over 100 ICBM test and training launchers, over 350 mobile ICBM launchers, over 1,300 stockpiled old ICBMs totally exempted. Moreover, the Soviets are free to continue to produce excess ICBMs at their three very active ICBM factories for additional stockpiling.

The Soviets thus actually will have exempted strategic forces more numerous than their first line forces which are counted in SALT II. They now have 2,850 delivery vehicles, compared to 1,732 for the United States. They are allowed 2,250 strategic delivery vehicles under SALT II, but they also will have about 2,720 second-line strategic delivery vehicles totally outside of SALT II. Many of these could also be MIRVed. So the Soviets really have up to 5,370 strategic delivery vehicles, compared to only 1,865 for the United States.

Thus the question of whether SALT II constrains the Soviets is moot and irrelevant. The Soviets already have superiority in all strategic measures. Moreover, the Soviets are already producing new strategic weapons on a mobilization, nearly wartime footing. There is strong evidence that they have already negotiated the terms of SALT II to fit their long-term force programming contained in their 1981–1985 five-year defense plan, and their force programming in any case provides them clearcut, overall superiority by 1985. We therefore do not need to worry about even more extreme Soviet threats which could exist in the absence of SALT II. The Soviet threat to the United States allowed within SALT II terms is already so dangerous as to jeopardize U.S. supreme national interests. This is one reason why the Senate Armed Services Committee report on SALT II of December 1979 stated without qualification that the Treaty was not in the national security interest of the United States.

C. SALT II codifies Soviet superiority

To sum up, SALT II's significant constraints on vital U.S. options and force levels alone made it intolerable. The facts that SALT II contains so many unilateral advantages for the Soviets, has so many ambiguities, loopholes, and exclusions, all favoring the Soviets, does not contain agreed qualitative missile baseline data, is largely unverifiable, does not constrain Soviet programs, and allows legal Soviet superiority by 1985, combine to make the Treaty anathema.

The fatal flaws of SALT II merely reflect and codify the shifting strategic balance. The strategic balance has already shifted against us long ago during the 1969–1979 SALT decade. Since 1969, the Soviets have added over 1,000 new operational missile launchers and over 250 Backfire bombers, while the United States has maintained a constant but lesser number of missile launchers and has deactivated over 250 B–52 bombers. The Soviets are now far ahead of us in missile launchers and bombers. By about 1981, the Soviets will also have added over 6,000 warheads, and will have overtaken the United States in warhead numbers and accuracy by 1985. Because most Soviet warheads are large and are on accurate ICBMs, they are much more lethal. Well before 1985, they will be ahead in all strategic measures. The shifting strategic balance makes SALT II unenforceable, even if it were verifiable,

which it is not. The shifting balance also will reduce U.S. bargaining leverage in any SALT III negotiations.

This Soviet thrust to strategic superiority has been expensive. Since about 1969, the Soviets reportedly have also spent a total of over $100 billion more than the United States on strategic forces, a yearly investment rate of 250 percent more than the United States. The Soviets have spent over $250 billion more than the United States on defense since 1969. While the Soviets spend more than 16 percent of their much smaller Gross National Product on defense, the United States spends only 5 percent. Of this small fraction, the United States spends only a miniscule .005 percent of our GNP on strategic forces.

In sum, fully within the terms of both the SALT I and II agreements, the Soviets have managed first to quadruple and then even to quintuple their counterforce threat to U.S. ICBMs, while removing the best U.S. option to redress their counterforce threat—ABM defenses of ICBMs and mobile ICBMs. The SALT I agreements were not a good bargain. Resting upon this unsound foundation, the SALT II Treaty is likewise even more dangerous to us, because it allows the Soviets to continue building precisely the types and numbers of strategic weapons capable of completely defeating our deterrent strategy.

In May 1972, a significant U.S. unilateral statement said that a permanent offensive limitation treaty would have to be reached in five years, by 1977. We went on to say that if a severe threat to the survivability of our strategic forces developed in the meantime, this could constitute grounds for abrogation of both the SALT I agreements—the ABM Treaty and the Interim Agreement—on the basis of jeopardy to our supreme national interests. Moreover, the Jackson amendment to SALT I of 1972 called for equal force levels in SALT II. This meant equality in throwweight and heavy missiles in SALT II. The Jackson amendment re-emphasized that failure to constrain the Soviet threat to the survivability of our forces in SALT II would make such a treaty unacceptable.

SALT II clearly does not meet these fundamental U.S. SALT II objectives as established in 1972.

SALT II does not provide equality in either numbers of delivery vehicles, numbers of warheads, counterforce capability, heavy missiles, or in throwweight. SALT II does not help our survivability problem. Indeed, it allows the Soviet counterforce threat to grow and it hinders the solution of our vulnerability problem. SALT II has thus further jeopardized our supreme national interests. Therefore, SALT II must be rejected. Further, the SALT I ABM Treaty must be modified to allow mobile ABMs or be abrogated, and U.S. compliance with the SALT I Interim Agreement should be abandoned.

VI. START: ANOTHER SHAKE OF SALT

President Reagan has proposed a new acronym for strategic arms control, and a new United States negotiating position. Strategic Arms Limitation Talks (SALT) has now been officially changed to START—Strategic Arms Reduction Talks. President Reagan's START proposal has six features, which comprise Phase I of the negotiations. These features are as follows:

(1) START will seek limits on "deployed missiles" and warheads, rather than on just launchers, as in SALT;

(2) START will focus constraints principally upon ICBMs and SLBMs;

(3) Bombers will be limited separately, and there will be no limits on bomber weapons;

(4) ICBM and SLBM warheads will be limited to 5,000 total;

(5) There will be a sublimit of 2,500 ICBM warheads, which will severely constrain United States SLBM forces carrying high warhead loadings;

(6) The total number of "deployed missiles" will be limited to 850. This will have the combined effect of limiting the scope of the United States MX ICBM and Trident SLBM deployment.

In Phase II of START, which is still undefined and which will presumably begin after Phase I is consummated, the United States will seek reductions in ICBM throw-weight to levels below the current United States level.

The premises of START, therefore, need to be examind on a technical level:

A. Limits on "deployed missiles"

"Deployed missiles" as a unit of account has yet to be defined by the Administration. It appears that this unit of account will incorporate SALT II counting rules for warheads on missiles and type rules for missiles and launchers. The net result is likely to be the use of launcher limits as the unit of account. Administration officials have confirmed this in the May 9 background briefing on the START proposal. One of the "fatal flaws" of SALT II (and SALT I) was the use of launcher limits as the unit of account. It is clear that launcher limits have not limited Soviet missile capabilities. Launchers were inadequately and imprecisely defined in SALT I and II; many Soviet missiles are "cold-launched" permitting the rapid reload of missile silos; missiles can be launched without using silos; and the Soviets are known to have a large stockpile of missiles for reload and refire.

In addition, "deployed missiles" as a unit of account is an indirect limit on Soviet missile throw-weight. Soviet missle throw-weight should be limited directly and should be an objective for Phase I. Using warheads as a unit of account also presents major verification difficulties. United States estimates of Soviet warhead production and the Soviet warhead stockpile have large margins of uncertainty. It is not yet clear how the United States will try to address these issues in START.

B. Focus on ICBM's and SLBM's

The aggregate ceiling of 5,000 missile warheads and the sublimit of 2,500 ICBM warheads will not assure equal capabilities. Under these "equal ceilings," the Soviets will have advantages in ICBM throw-weight, megatonnage, prompt hard-target kill capability, and an inherent breakout potential for warheads. Relatively low yield U.S. SLBM warheads are lumped together with high yield Soviet ICBM warheads. U.S. SLBM warheads are not first-strike weapons; Soviet ICBM warheads are indeed first-strike weapons. The SALT II debate demonstrated the "numbers fallacy"—that equal numbers do not necessarily translate into equal capabilities. In addition, SALT II counting rules will be used in START. Such rules have inherent verification difficulties.

C. Foreclosure of single warhead option

The basic framework of START—a relatively high level of missile warheads (5,000) on a relatively low level of "deployed missiles" (850)—is the antithesis of stability. Like SALT II, START forces each side to deploy large numbers of MIRVed warheads on a few launchers. Each side is forced to deploy large missiles in order to deploy the permitted number of warheads. This factor creates an enormous first-strike bonus for the Soviet Union. One Soviet ICBM warhead can destroy 10 U.S. MX warheads. Such an exchange ratio creates instability.

Presently, the U.S. has 1,052 ICBM silos or aimpoints and the Soviets have approximately 6,000 ICBM warheads. The ratio of Soviet hard-target capable ICBM warheads to U.S. aimpoints is 5:1. Under START, the ratio could actually increase depending on how the U.S. deploys the MX missile. U.S. plans for MX deployment remain unclear but the Soviet's can be expected to press for strict limits on MX basing.

The option for deploying a small, single warhead ICBM has been foreclosed by the START proposal. The limit of 850 "deployed missiles" rules out an ICBM force of many small, single warhead missiles survivably based in a multiple shelter system. Such a system would do much in restoring stability.

D. 5,000 limit on ICBM's and SLBM's

The warhead limit does not distinguish between Soviet first-strike ICBM warheads and U.S. second-strike SLBM warheads. The differences in yield and accuracy are significant. There are also significant differences between U.S. ICBMs and SLBMs in terms of the role each plays in U.S. nuclear strategy. The limit of 5,000 warheads will force the U.S. to cut its seabased deterrent force drastically—today, the most survivable leg of the TRIAD. In a period of serious U.S. ICBM vulnerability continued delay and uncertainty on MX basing, and an increasingly vulnerable B–52 force, it is imprudent to place such limits on the SLBM force.

Without START, the U.S. SLBM force will increase to over 45 boats (from the present 32) by 1993. With START, it will be reduced to between 12 and 18 boats depending on U.S. force decisions. Even with a dyad of SLBMs and bombers, the U.S. could not maintain an adequate SLBM force under the Reagan Administration's START proposal.

E. Sublimit on ICBM's

The 5,000 missile warhead limit and the 2,500 ICBM warhead sublimit are peacetime levels. The key strategic relationship is not the number of peacetime U.S. warheads compared to the number of Soviet warheads; it is the number and type of surviving U.S. warheads vs. the number of Soviet targets to be attached. The Soviets have thousands more strategic targets than the U.S., many of them extremely hardened. It is not clear that U.S. targeting requirements were given sufficient analysis in the formulation of the START proposal. What is critical to deterrence is that sufficient U.S. strategic forces survive a well-executed Soviet first-strike and have the capability to destroy a range of Soviet targets. The ICBM force is central to U.S. nuclear strategy. It is the most flexible and accurate missile leg of the TRIAD.

Its command control and communications are the most secure. Yet without a survivable basing mode for the ICBM force, the U.S. will not be able to implement its nuclear targeting strategy. The doctrinal implications of the START proposal—increased reliance on slow air-breathing systems and reduced SLBM forces, have not been analyzed by the Administration.

F. Offensive versus defensive

The START proposal addresses strategic nuclear offensive forces. Soviet ABM capabilities have been ignored even though the Soviets have a significant ABM breakout potential. The second ABM Treaty review is scheduled for Fall 1982, but there has been no decision on either the forum for the review or the U.S. position. Originally, the U.S. attempted to link the levels of strategic offensive missile forces with the levels of ABM forces. During the SALT I negotiations, the U.S. abondoned this principle and agreed to link levels of U.S. ABM defenses with Soviet ABM defenses. However, the U.S. stated that if a follow-on agreement to the SALT I Interim Agreement on Offensive Arms was not negotiated within five years, U.S. supreme national interests could be jeopardized, constituting the grounds for withdrawal from the ABM Treaty.

The linkage between offense and defense was further broken by the enormous Soviet buildup during the 1970s and the failure of the U.S. to establish a strategically sound relationship between offense and defense. Unlike the U.S., the Soviets have continued to develop and deploy extensive strategic defenses—including air defenses (which have an inherent ABM capability and upgrade potential), as well as the basis for a nationwide ABM system. Given the Administration's proposed reductions in U.S. offensive missile capabilities, Soviet strategic defenses must be addressed because of their implications for deterrence and their role in Soviet strategy. Thus far, however, the Administration has not integrated the critical issue of strategic defense with START. In fact, the U.S. appears willing to accept equal numerical bomber limitations without any limitations on Soviet air defenses. Such an approach will contribute to an unequal START agreement.

G. Adverse impact of the process

The SALT II debate highlighted the adverse impact of the arms control process on U.S. national security. The promissory nature of SALT—that deficiencies in one agreement would be corrected by the next agreement—was also noted. As the critics of SALT II pointed out, SALT II was the next time around" as far as the defects of SALT I were concerned, and despite U.S. unilateral restraint and a deep commitment to the arms control process, the strategic balance continued to shift against the U.S. The SALT process contributed to the Soviet drive for strategic superiority.

The Reagan Administration's approach to the START negotiations is all too similar to previous commitments to the SALT process. The Administration is apparently planning to follow a phased approach to START. Adherence to a phased approach will trap the U.S. in another arms control process and the process will become more important than the specific terms of any agreement. Commitment to an arms control process leads to deferral of important issues. For example, the

crucial issue of seeking equal levels of ballistic missile throw weight seems to have been put off until the "second phase" of START. As long as the U.S. is willing to defer critical issues, the Soviets have less incentive to negotiate equitable arms control agreements in the interest of the U.S. Deferral of such an issue makes the U.S. hostage to the arms control process. Rather than deferral of the throw weight issue, Soviet agreement to negotiate equal levels of ballistic missile throw weight should be seen as an indication of the Soviet Union's commitment to equitable and verifiable arms control.

The Administration's plan to phase issues in START also makes START hostage to U.S. domestic policies. This only gives the Soviets additional negotiating leverage and a propaganda opportunity to exploit.

H. Strategic force modernization

Also hostage to the START process are the Administration's strategic force modernization programs. In an effort to present itself as "fair"—caused by perceptions of domestic political considerations—the Administration has "put everything on the negotiating table." Such an approach will serve to fuel Congressional opposition to essential strategic programs and increase pressures to find "an arms control solution" to critical national security problems.

But the decade of SALT showed the futility of looking to arms control to solve such problems. Rather than using its strategic modernization program as an incentive for the Soviets to negotiate seriously, the Administration should emphasize that the strategic modernization program is essential to deterrence. This was the justification cited when the program was announced in October 1981. Using the program as a bargaining chip will only work against U.S. security interests.

Thus far, the Administration is playing into the hands of those who use the "arms control process" as a means to stop the U.S. from restoring the balance. Expectations for arms control must be kept in line with the realities—like SALT, it is unlikely that START will limit the Soviets in any meaningful way. START is more likely to hurt the U.S.

I. Verification

In SALT, the U.S. made critical concessions on verification issues. The Soviets can be expected to resist verification measures that are in the U.S. interest, arguing that they are not needed. In general terms, verifying the START proposal will be extremely difficult. difficult. How well the number of deployed missiles can be verified is in large measure dependent on details of the treaty. Similarly, the verifiability of the number of warheads on "deployed missiles" is greatly dependent on the agreement's language. With regard to Soviet refire and stockpiled missiles, numbers of warheads actually deployed (rather than determined by "counting rules"), stockpiled warheads, missile and warhead production rates cannot be predictably determined by national technical means, and "cooperative measures" have limited utility. As President Reagan said in his press conference of January 29, 1981, "There is no verification as to the number of warheads on the missile, no method for us to do this."

J. Subordination of defense to arms control

A decision to continued to abide by the terms of the SALT II Treaty would be conceptually and politically unsound. Conceptually the Administration claims it is seeking a new framework for START Continued adherence to the SALT II would undermine the Administration START proposal and will assure that START is a continuation of the SALT framework based on launchers. Adherence to SALT II also means that the U.S. would be prepared to accept a treaty that is unequal, unverifiable, and "not in the national security interest of the United States." Would not such action be seen by the Soviets to be a major retreat by Ronald Reagan? The Reagan Administration's arms control policy, like Carter's policy, must not subordinate U.S. defense requirements to arms control considerations. The subordination of national security policy in reaction to perceptions of public and allied concerns would be fundamentally indistinguishable from the Carter approach which made arms control the centerpiece of U.S.-Soviet relations.

Politically, adherence to SALT II would send a signal to the Soviets that the Reagan Administration, like previous Administrations has domestic political pressures it does not have the will to resist. Indeed, the fact that the Reagan Administration has neglected to withdraw the SALT II Treaty has provided the Soviets a propaganda bonanza.

In addition, the Administration has not confronted the Soviets on compliance with SALT II—most recently, evidence of Soviet deployment of the SS–16 ICBM in violation of SALT II.

K. Linkage with Soviet aggression

Finally, the Reagan Administration's willingness to resume strategic arms control negotiations in light of Soviet pressures on Poland, continued occupation of Afghanistan, clear violation of chemical and biological warfare arms control agreements, and increased support for proxy aggression throughout the world, demonstrates that the Administration has rejected the concept of linkage. Is arms control more important to the Administration than holding the Soviets accountable for their international behavior.

VII. THE NUCLEAR FREEZE DEBATE

The rapid development of popular political support in this country and Europe for a so-called mutual nuclear freeze has made a radical change in the terms of reference for discussions about arms control and disarmament. The Soviets are enjoying a handsome pay-off for their years of prodigious disinformation efforts, while the spectacle of a complete re-casting of the policy framework for nuclear arms control plays itself out in the United States.

Sustained efforts by numerous spokesmen will be needed to quell the populist impetus for nuclear freeze. Even then, the prognosis for success—for restitution of a political consensus which would sustain long-term maintenance of U.S. nuclear deterrent force programs—will remain decidedly uncertain.

Nuclear freeze threatens not only the so-called strategic force programs (Minuteman, Trident, bombers); but all nuclear weapons programs for every Service. To the vast relief of the entrenched lobby

which advocates unilateral disarmament "initiatives" by the United States, the prior policy imperative that our country reach carefully negotiated, mutually ratified, and verifiable constraints has been pushed aside. The catchy phrase "nuclear freeze," despite disclaimers which cannot be taken seriously, is simplistic, unilateral, and aims toward a quick fix of what appeared in 1981 to be nuclear disarmament's terminal malaise. As a domestic U.S. political issue, it is made to order as a comeback for demoralized arms controls. As a stake aimed at the heart of all existing and planned U.S. nuclear deterrent capabilities, it is the deadliest threat since the total test ban drive of the early 1960s.

There is a widespread perception that an uninspected moratorium on testing, production, and deployment of nuclear weapons and delivery systems is a novel idea. But the United States' chemical weapons program went into a politically-inspired freeze in 1969, when research and development on binary weapons was completed. Congress had determined that it was time to stop the "race," and to negotiate a total elimination of offensive chemical weapons. A freeze (or "cut-off") of production of weapons-grade nuclear materials was first advocated in Eisenhower's day, was resuscitated for the United Nations Special Session on Disarmament in 1978, and has been proposed again by Senator Cranston. America has frozen nuclear test yields greater than 150 kilotons since 1976, even though the treaty embodying this restraint has been deemed unworthy of ratification even by many disarmament purists.

What is new about nuclear freeze is that never before have individuals in positions of responsibility in our government, those campaigning for such positions, and the national news media opinion leaders, been willing to advocate a course of disarmament so lacking in all aspects of verification. Even when Dr. Harold Brown, as Secretary of Defense, was cynically arguing in public that the United States could verify SALT and a total test ban treaty, the need for verifiability was accepted as a fig leaf to cloak the true unilateralist impulses of top government policy-makers such as Cyrus Vance and Dr. Harold York, and purist anti-nuclear lobbies such as the Arms Control Association. The extremism of today's nuclear freeze policy advocates is rationalized on the basis of the "overkill" doctrine, which apparently gained credence among voters as a result of NATO's theater nuclear force modernization decision of 1979.

Thus, the "nuclear freeze" of 1982 is not at all new. It is only the newest manifestation of the long-sought "holy grail" of true disarmers— the total (or "comprehensive") test ban. Sadly, the approach to arms control and disarmament represented by nuclear freeze—so lacking in credibility for so long—now appears to be palatable to a vast and growing throng of newly aroused political opponents of nuclear weapons.

Several causal factors underly the newly discovered credibility of nuclear freeze.

A combination of circumstances is serving to whip-up popular support for such a doubtful proposition.

Liberal opponents of U.S. nuclear force programs are quick to blame Ronald Reagan's anti-Soviet rhetoric and the "provocative" NATO Plan to modernize its theatre nuclear forces with PII and GLCMs.

More cogent casual factors are the broad publicity accorded to the rejuvenated campaign by the Physicians for Social Responsibility to portray the effects of nuclear war (with strong support from the Federal Government's ACDA), Ground Zero Week, and the national campaign for a nuclear freeze initiative on the 1982 California ballot.

Just as President Reagan has changed the terms of reference for the Federal budget debate, nuclear freeze has succeeded already in changing the terms of reference for arms control discussions.

Television's consistently unbalanced coverage of nuclear weapons-related issues is certainly a definite causal factor in changing American popular attitudes. Sadly, it must be said that our networks provide an effective vehicle for transporting the unremitting flow of extremely harsh, vituperative anti-American slander promulgated as official policy of the Russian government. Since it kicked off the anti-neutron bomb campaign in 1977, effective Soviet propaganda directed against America's modest defense efforts has become a staple of the network TV news.

But, ominously, the stampede of popular opinion toward the nuclear freeze is most fundamentally the result of growing irrational fear of the Soviet Union forecast by Dr. Richard Pipes sometime ago. In "Soviet Global Strategy" news describes the trend toward a Soviet inspired intimidation f America, to be gained by Moscow's unabated nuclear expansion. The nuclear freeze movement in the U.S. and Western Europe represents a large-scale abandonment of any pretense of opposition to the reality of Soviet nuclear hegemony.

The policy and legal antecendents to nuclear freeze lie in the language of several treaties aimed at limiting or constraining various aspects of U.S. nuclear weapons. Beginning with the Limited Test Ban Treaty of 1963, these include the Treaty for the Prohibition of Nuclear Weapons in Latin America (1968), The Non-Proliferation Treaty (1970), The US-USSR Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War (1971), The Anti-Ballistic Missile Treaty (1972), the US-USSR Agreement on the Prevention of Nuclear War, The Threshold Test Ban Treaty of 1974, the Peaceful Nuclear Explosions Treaty of 1976, the SALT II (1973) Treaty of 1979, and the draft text of the Comprehensive Test Ban Treaty negotiatd by the Carter Administration. Because of the ruinous effect of a comprehensive test ban on U.S. military capabilities (whether the Soviets comply or not), it is somewhat redundant for the nuclear freeze resolutions to call also for banning the production and deployment of nuclear weapons.

The radically changed terms of reference for the political debate in this country over constraints on nuclear weapons can be observed in comparing the nuclear freeze with the SALT Treaty up for ratification only three summers ago. A treaty with long, detailed, complicated provisions, the product of months of negotiations preceding its signature, and having the total support and participation of the Executive Branch—including principally the Department of Defense—had been brought before the Senate, but could not be consummated. It is indeed ironic that already revisitionists are advancing the theory that the failure of SALT II in the Senate was due to factors other than the firm, principled opposition of a majority of the U.S. Senate. It is necessary for the maintenance of integrity in

arms control discussions to keep in mind that Afghanistan was not a cause, but a pretext, for the presidential recommendation to withdraw the treaty from active consideration. SALT II was dead in the Senate before Afghanistan.

Those who fought the successful battle against SALT II must never let revisionists deprive opponents of their rightful credit. If the Soviet Afghanistan invasion had never occurred, it would need to have been invented to get former President Carter off the hook with an unratifiable treaty.

There was no constituency in 1979 for a simplistic, unilateralist nuclear freeze. America had dabbled with the uninspected moratorium on nuclear testing between 1958 and 1961. The result was that President Kennedy, who desperately wanted a total test ban, could not countenance another uninspected moratorium.

It is asserted that the current freeze motions call for "adequate verification." This empty husk of a caveat cannot be taken seriously, as we will discuss in some detail. Suffice it to say here that the political realism manifested by the nuclear freeze proponents in so many ways, gives the lie to their protestations that the freeze will not be unilateral in effect.

Today, according to a major poll, nearly 75 percent of Americans want a nuclear freeze. Doctrinare disarmers have come full circle: from their greatest defeat—SALT II—to approach their greatest victory—nuclear freeze as a political imperative for a conservative Republican administration.

It is important to bear in mind the chemical weapons precedent, in relation to the issue of nuclear freeze. As mentioned, freeze is not new. In fact, the Americans have great experience with freeze. We have been in a freeze-while-negotiate situation on chemical weapons since 1969.

What has already been done to our chemical deterrent is now being advocated and planned for our nuclear deterrent. It is an appalling prospect.

U.S. research and development on binary chemical weapons was completed in 1969. A production decision, including funding for production facilities, has been pending ever since. Production of binaries has been repulsed by the dictum of a Congress tantalized by the Arms Control and Disarmament Agency and its lobby into belief that it would be better to negotiate a prohibition of chemical weapons than to "waste money" on building a modernized American deterrent.

Twelve years later, we have as a result no modernized chemical deterrent, no realistic near-term prospect for obtaining one, no treaty, but widespread use of offensive, death-dealing chemical weapons by Soviets and their proxies.

Can we contemplate a different result from a dozen years of nuclear freeze?

The U.S. ABM system remained operational for approximately six months, before Congress zeroed out funding on the grounds that we had a treaty against it.

Testing of nuclear explosive devices has always been the bedrock upon which rests the technology of nuclear weapons, and hence the creditability of America's deterrent posture. Therefore, the policy of

our government toward nuclear testing and production of the weapons is of paramount military significance.

Without a sound technological base upon which qualified scientists can assess the adequacy and reliability of the nuclear explosive devices associated with our strategic, theatre, and tactical nuclear delivery vehicles; maintenance of a reliable, modern, and hence effective nuclear deterrent posture becomes an impossibility. This situation appears to be ignored by the numerous congressmen who support "nuclear freeze," while at the same time supporting Defense and Energy Department appropriations for forces to imlement a nuclear deterrent national defense strategy, and research designed to assure—not equality—but U.S. technological superiority.

Present policy of our government permits a limited number of tests each year by the Los Alamos and Livermore National Laboratories. The Senate has held in abeyance ratification of two treaties, negotiated with and signed by the Soviet Union, in the interest of seeking the so-called comprehensive test ban, or "CTB." However, interest in proceeding with ratification of the Threshold Test Ban and Peaceful Nuclear Expositions treaties has been revived, apparently as a reaction to the nuclear freeze euphoria.

The test ban advocates proceed from a tacit assumption that it will in fact be desirable and acceptable for the U.S. to cease altogether its nuclear testing. However, testimony before Congress has raised serious but little-understood opposition to the policy of seeking a total nuclear test ban. The late Senator Dewey Bartlett of Oklahoma emphasized the serious ramifications of a nuclear test ban:

> With or without SALT II, our Minuteman ICBM force will be seriously threatened in the early eighties. Thus, the United States is likely to be in need of new strategic weapons systems in the next decade—systems such as cruise missiles MX, and Trident II, which would require at least limited testing of warheads. A comprehensive test ban treaty could greatly hinder these programs and prevent the United States from maintaining parity with the Soviet Union, even if both sides complied with the test ban. Soviet secret testing, or a massive Soviet testing program conducted immediately upon termination of the ban, would make the situation even worse. (CR, Senate, 15 Nov. 77, p. A19048.)

Clearly, our country has needs for nuclear testing. Although the numbers and kinds of tests have been ratcheted downward by political decisions for some years now, and while past presidents have proffered their willingness to quit testing altogether, the tests continue. Is our test program now merely a bargaining chip without military rationale?

America's nuclear testing program is an important national security resource. The technology of nuclear explosives is a government monopoly, and must necessarily remain so. There is no "second source" other than the federal government to provide nuclear weapons. The nuclear weapons complex, including the critically important underground test program, is not a large factor in terms of percent of total defense spending. This point is illustrated by the comment of Congressman Melvin Price, Chairman of the House Armed

Services Committee (HASC), as he urged passage of the DOE National Security and Military Applications of Nuclear Energy Authorization Act of 1980:

> While this authorization bill represents only 2 percent of the President's total request for national defense for fiscal year 1980, its importance and contribution to our future strategic posture is much greater than its percentage indicates. (CR, 9 Nov. 79, P. H10482)

The comprehensive nuclear freeze is of fundamental concern from the point of view of U.S. strategy and security interests. Broader in scope than SALT, a freeze on testing and production would adversely affect the entire nuclear weapons inventory of all branches of our armed forces. A truly comprehensive freeze would obviate the possibility of there being any newly designed or improved U.S. nuclear weapons, would undermine confidence in the existing weapons stockpile, and would mark the beginning of the end for the nuclear explosive technology infrastructure of people and facilities within the Department of Energy (DOE.)

While responsible officials admit that a "fixed duration" agreement (i.e. a 3 or 5-year freeze, rather than one of indefinite duration) would somewhat mitigate the adverse effect of a test ban in the near term, this negotiating ploy should not be used to prevent consideration of the fundamental issues involved. If, despite known obvious hazards, this country enters into a freeze because of overwhelming domestic and foreign political pressures, why should anyone believe that the U.S. would resume testing at the end of the "fixed duration?"

Another shibboleth, that of an "adequately verified" comprehensive test bank and production freeze, facilities acceptance of a damaging and unwarranted assumption that there will be "symmetrical" degradation of both the U.S. and USSR's nuclear establishments. People who believe a freeze can be "adequately" verified welcome evidence and testimony which describes severe adverse impacts of a test ban on the U.S. nuclear weapons complex, as evidence that will also befall the Soviet Union! But the House Armed Services Committee determined, after extensive investigation, the idea of "equal degradation of stockpiles is technically unfounded." (HASC 95–90, Oct 78) Nuclear freeze should be considered recognizing its tangible risks—rather than embraced with a false promise of speculative "symmetry."

The SALT II Treaty and the draft Comprehensive Test Ban Treaty negotiated during the Carter Administration are complex documents, not easily understood by non-specialists. International political and military developments since the end of the Carter tenure have greatly complicated the situation for policy planners and those responsible for achieving the much talked-about negotiated agreements with the Soviet Union and other nations. Too often, debates over technical questions (such as the Backfire bomber's performance) pre-empt broad-based consideration of more fundamental issues and assumptions inherent in one or more sets of negotiations.

Most importantly, the fundamental issues need to be addressed in the negotiations with the other negotiating parties. The current debate in the United States on nuclear arms control and disarmament is a monologue—Americans talking to and "negotiating with"—them-

selves! Individuals who talk to themselves are regarded as mental health cases. Hence the nearly-insane character of the discussions—principally fear-of-nuclear-war discussions—going on within our society and our bureaucracies. These talks exhibit a high degree of abstraction and irrationality precisely because they are disengaged from the issues raised by the pathologically anti-western communist cult which rules the Soviet Union.

While the Soviet Union continues to produce chemical and biological weapons—and to wage biological warfare through proxies in violation of the 1972 BW Convention Senators and Congressmen tout "nuclear freeze" as the ultimate and latest in arms control and disarmament concepts. The President is proposing actual reductions in nuclear weapons and delivery vehicles, having discarded the "linkage" concept the U.S. had been struggling to implement on behalf of its global interests since the Soviet ravagement of Afghanistan began in late 1979.

While we are observing the growth of "a whole cottage industry producing books celebrating the horrors of nuclear war," no credence or credit is given to the U.S. for having fewer weapons, less megatons, and an overall substantially degraded and less threatening nuclear posture than twenty years ago. The same analysts who assured our country's elected representatives twenty years ago about the benign intentions of the Soviet Union and their "justifiable" response to the lamentable provocations of the U.S. nuclear "build-up;" now urge our representatives to withhold nuclear retaliation against the massed armor of the Warsaw Pact forces in Central Europe.

Military planners who have devoted entire professional careers to the careful, studied, explicit, and conscientious application of a nuclear targeting policy which has never called for attacking civilians; are told by recently-arrived concerned clerics to divorce themselves from such "immoral" weapons. If it were true that the weapon—not the man—is inherently evil, then unilateral disarmament cannot possibly help us. It is therefore irrational to propose unilateral restraint on the basis that the inanimate object is inherently evil.

The following fundamental issues and assumptions have particular relevance in the current climate of political and policy ferment regarding nuclear disarmament:

A. Nuclear disarmament and nuclear deterrence

Disarmament means no testing or production of weapons. Maintaining a deterrent requires some testing, and production of modernized devices. So these two policies cannot harmoniously coexist.

The United States has made, and continues to make, pledges to disarm. These pledges are made particularly in multilateral negotiations linked with United Nations disarmament activities. Nearly twenty years ago, military reservations about nuclear disarmament doctrine as enunciated in the preamble to the Limited Test Ban Treaty could be set aside as a problem for the future—a future which is now. Only those ignorant of the broader political context of U.S. nuclear disarmament commitments should have been surprised with the dramatic turnaround of the Reagan administration on the subject of nuclear arms control and disarmament.

Nuclear deterrence remains the basic military doctrine for defense of the United States. Ironically, in recent years it would appear that

analysts such as Colin Gray are more strongly supportive of—and more committed to—such a doctrine than the Secretary of Defense or the Joint Chiefs of Staff. Massive investments to procure and operate modern strategic, theater, and tactical nuclear deterrent forces are in danger of being rendered incredible by a countervailing doctrine of nuclear disarmament, which hinges on a cessation of nuclear testing and weapons production, i.e. nuclear freeze.

While the U.S. military establishment goes to great lengths to justify and "sell" to the Congress and the public the delivery systems for nuclear weapons—glamorous airplanes and missiles—it is mute or strangely inarticulate in justifying the explosive devices themselves—which are precisely the target of the nuclear "freeze." But unilateral disarmament would in fact be "progress" in disarmament, because if you accept the premise that nothing is more important than avoidance of nuclear war—the logic for nuclear freeze remains impeccable.

U.S. arms control and disarmament doctrine has been evolving toward the current situation for many years. Before the existence of the Arms Control and Disarmament Agency as an institution of government, there could have been some who questioned the propriety of an official component of our federal government which unflinchingly supported Soviet views. Today, the dogma of "shared objectives in arms control" has had the result of cloaking ACDA and its massive lobby in an official immunity from questioning of the origins and implications of its slavish support of positions which are identical to those of Soviet propagandists.

The situation is typified by the media's discussions of Soviet responses to the President's Eureka speech which said that the Soviets confined themselves to quoting U.S. opponents of the President. But governmental policies supporting nuclear disarmament and nonproliferation are increasingly eroding political support for the maintenance of the forces needed to carry out the nuclear deterrence strategy. The shocking extent of the erosion of political support for nuclear deterrence is only now becoming manifest.

If the United States really plans to maintain the nuclear deterrent force into the 1980s, the 1990s, and beyond; logically we must take all those steps necessary to keep nuclear weapons reliable, as well as to effect needed modernizations and improvements. This need is incompatible with nuclear freeze.

B. Monitoring nuclear test and other weapons activity

Deprivation of all U.S. testing progressively will rob our country of the expertise needed to assess other nations' progress achieved by testing at yield below the monitoring threshold. Mechanisms for handling on-site inspections, and granting access to declared sensitive facilities, apparently do not exist in the Soviet Union.

The central fact about verification of a nuclear test freeze, or ban, is that there will always be a threshold of identification below which we will be unaware of other states' nuclear test activities. In this respect a nuclear freeze is qualitatively different from SALT monitoring. It has been accurately observed that SALT negotiated about what could conceivably be monitored—not necessarily the most important systems or sub-systems.

The draft test ban treaty which emerged from the Carter round of U.S./U.K./U.S.S.R. talks is assumed to "ban" all nuclear testing,

while the SALT agreements are essentially designed to regulate force levels of certain types of delivery vehicles or launchers. Where SALT agreements do entail bans, the controversy over their verifiability has intensified, as in the "new types" question.

It has been acknowledged that we will have a declaratory ban but only a threshold monitoring capability, but the word "comprehensive" is still used in describing the test ban which President Carter's team negotiated, even though the existence of a threshold makes that title a misnomer.

Test ban and nuclear freeze advocates must therefore grapple with the question of what Senator Church termed the "military significance" of below-threhold nuclear testing by other states. "Breakthrough" improvements in seismic monitoring continue to be touted as sufficient for the U.S. to safely ignore the monitoring threshold, and thereby to remove the "military significance" of any below-threshold test activity by other states. But the only relevant experience we have with monitoring Soviet activity, as pointed out by Donald Westervelt, are the threshold test ban, in effect (for U.S. compliance) since 1976; and the nuclear test moratorium of 1958 to 1961. Questions continue to be raised about Soviet compliance with the Threshold Test Ban Treaty; and careful analysis suggests the Soviets probably carried out undetected and/or unidentified tests during the older moratorium in order to prepare for their dramatic breakout which occurred in 1961.

Another risk for the United States in crediting the Soviets with Threshold Test Ban compliance, is in legitimizing a very high frequency of Soviet testing (while U.S. tests continue to be restricted to truly low numbers) as the "minimal" number of nuclear tests which the treaty stipulates should be conducted at any yield! The behavior of nuclear freeze advocates on this issue is another clear indication that they are completely satisfied with unilateral U.S. constraints and restraints leading to disarmament and serious capability reductions on the U.S. side without balancing restraints on the Soviet side. Again, the logic—if you are "for" "progress" in "disarmament," then you must applaud degredations in the U.S. posture. Balanced reductions or constraints—while politically popular—are strictly in the "nice to have" category with U.S. disarmament activists.

The argument is repeatedly made by nuclear freeze advocates that, once expected (but seldom realized) improvements in monitoring capability are made—such as establishment of a large network of seismic stations within the Soviet Union—the Soviets would not "risk" testing at yields available to them below the lowered threshold because the United States would so strongly react and object. And, it is argued that other countries would react to put "political pressure" on the Soviet Union to behave. This kind of argument regarding "pressures" on the Soviet Union to comply with solemn international agreement continues to underlay numerous proposals for arms control and disarmament agreements with the Soviet Union, despite the debacle to Soviet credibility contained in the "Sverdlovsk incident" and the "yellow rain" employment in Southeast Asia. And the logic of supposing that the United States would strongly object to ambiguous Soviet activity of a kind which we had already decided was not "militarily significant," is not apparent.

The House Armed Services Committee CTB Panel concluded in 1978 that an approximate 10 kiloton threshold monitoring capability now exists, for policing activity at known Soviet nuclear test sites. Tests in seismic regions, or decoupled tests, have their own much higher thresholds of identification. But the Soviets could maintain their stockpile by testing at the known sites under the 10 kiloton threshold.

While test ban advocates claim the regional network of seismic stations will lower (but not eliminate) the threshold, the network cannot be installed for years after any agreement enters into force. Manufacture of some seismic stations, and the unpredictably long process of site selection within the USSR, will not even begin until after entry-into-force of the test ban and nuclear freeze. A degree of Soviet cooperation including access to their sensitive sites and facilities never before achieved will be required to verify a freeze on nuclear testing and production by the Soviet Union. (The Soviets should encounter little difficulty gaining access throughout the United States.) Both the Carter and Reagan administrations have withheld ratification of the Threshold Test Ban Treaty and Peaceful Nuclear Explosions Treaty (while imposing the treatys' constraints upon the U.S. nuclear establishment and crediting the Soviets with compliance) which contain provisions which might be able to prove out the feasibility of the Soviet cooperation in implementation of mandatory inspections and access of U.S. authorities to the Soviet Union for compliance monitoring. These treatys' provisions—once described in "breakthrough" terms—cannot be implemented, and were not incorporated into the comprehensive test ban negotiated during the Carter round.

A total test ban or nuclear freeze could also jeopardize our fusion technology research which this country needs to continue as an important gauge for our scientists to use to judge what would be possible in the future nuclear developments of other states.

C. Nuclear explosive technology

The means to design and certify new nuclear weapons, and "fixes" to existing ones, cannot be kept alive without some testing—it's that simple. The development of capabilities for setting off nuclear fusion explosions using the inertial confinement technique poses a challenge to the whole concept of prohibiting states from realizing the military benefits of nuclear explosions by imposition of a ban policed primarily by seismic monitoring techniques.

Policing for compliance a treaty banishing the entire technology of nuclear explosives is only a theoretical possibility. The previous attempt at such a technology ban—under the Biological Weapons Convention—has been discredited by continuing Soviet germ-warfare activities a decade after entry into force of the "ban."

Disarmament advocates assert that banning nuclear tests will achieve the objective of "freezing" nuclear explosive technology. But the details of the technology question are seldom debated or considered.

Nuclear explosive technology is not "mature," so we run the risk of technological surprise in a test ban situation' The test ban contradicts a basic purpose of our nation's priceless technical assets—the nuclear laboratories. These laboratories exist not just to fix problems in an aging weapons stockpile, but to also press forward the frontiers of the technology—to gain essential knowledge not only for weapons

developments, but to give us the capability to monitor foreign developments by knowing what can be known about the basic technology. Inertial confinement fusion technology is significant in the context of a test freeze. ICF reactions—which are nuclear explosions—do provide important military benefits to the United States, benefits which promise to expand as the technology progresses.

The theory of negotiated technological banishment can be shown to be invalid in the specific case of the comprehensive test ban. There is no feasible way to ascertain that the Soviet Union—or other important technologically-advanced states—are discontinuing all their nuclear explosive research. Cessation of nuclear explosive research—including inertial confinement fusion research—in other countries cannot be monitored without reliance upon a system which ultimately depends upon voluntary disclosures by states party to the agreement—information which must be accepted on faith.

Two other technology issues are break-out risks and the idea of "symmetrical degradation." While the serious problem of the threat of a Soviet break-out from a nuclear freeze cannot be avoided, the risks are exacerbated by the new technology of inertial confinement fusion, which the Soviet Union is vigorously pursuing.

The idea of "symmetrical degradation" basically is that, since the U.S. plans to negotiate "adequate" verification provisions for the nuclear freeze (such plans are becoming increasingly tenuous), any degrading effects which lack of testing will have upon the U.S. will happen also on the Soviet side. In the absence of this belief, it would be impossible for nuclear freeze advocates to claim that a test ban would "freeze" nuclear explosive technology. Thus the technology issue and the monitoring and verification issues are inextricably linked.

D. Nuclear stockpile confidence

No new designs can be certified without testing, and the same logic applies to fixes of problems in stockpile weapons. Without testing, the stockpile will degrade and become unreliable, a fact which remains despite various efforts to finesse the issue. Absence of an ongoing test program will inevitably undercut our design and maintenance capability to some degree. The same persons who loudly proclaim their support for a "freeze" because of the "danger" of nuclear weapons, and who demand perfection and more in the construction and operation of nuclear power plants because of the "danger" they pose, are firmly in support of a nuclear test ban which would strip officials responsible for the nuclear stockpile of the means employed for nearly 40 years to maintain a safe and reliable inventory of explosive weapons.

The issue of nuclear stockpile confidence centers upon the question of whether testing is needed in order to maintain a workable, reliable stockpile of nuclear weapons. The issue has grown as the stockpile has aged. While some former officials of the nuclear weapons establishment now claim that nuclear-yield testing is not needed to maintain the stockpile, that is not the view of persons who are responsible by law for the nuclear stockpile. There is a vast dichotomy liberals on the question of who to believe on nuclear power plants versus nuclear weapons. The regulatory establishment for power plants—the NRC—is vigorously exhorted to make sure of the scrupulous compliance of power plants with safety standards. But when those responsible for

the explosive weapons stockpile come forward to conscientiously request funding of programs to maintain the safety, security, and reliability of the explosive weapons, liberal members of the House and Senate come forward for proposals for arms control via "mutual unreliability."

A key issue in nuclear stockpile confidence is certification of designs by the weapons laboratories—described as a "promise" to the Defense Department that the weapons will perform within specifications for a predictable period of time. But nuclear disarmament advocacy has evolved into a policy that connects tinkering with the techniques we employ to fix faults in nuclear weapons, and taking the gamble that nothing really bad will happen to our stockpile during a nuclear freeze; with the advancement of world peace, stability, and "arms control."

The stockpile confidence issue also includes the extremely important question of activities to be allowed during a test ban or freeze. This involves the self-policing that the United States will carry out during a test ban, and the degree of access to our facilities to be granted to foreign compliance monitoring authorities under the multilateral verification regime contemplated by the Arms Control and Disarmament Agency. During the Carter Administration, ACDA technicians were clearly laying the groundwork in inter-agency policy decisions to place themselves in the position to dictate—in consultation with Soviet and other foreign representatives—to the U.S. nuclear laboratories what experiments would be permitted and which ones would not. ACDA claims that it is the only body which would be "objective" in determining whether the conduct of U.S. researchers was in compliance with the "spirit" of nuclear disarmament agreements.

So-called alternatives to nuclear-yield testing proposed by test ban advocates, such as remanufacturing defective weapons to specifications perhaps twenty years old, are found upon examination to be inadequate—not really viable alternatives at all. It would make more sense to stipulate that Chrysler remanufacture a 1958 Dodge to the original specifications than to require the Department of Energy to remanufacture a Minuteman II warhead.

In addition, our on-going nuclear-yield test program has been the principal means of detection of the most serious stockpile faults, even though there is also an elaborate non-nuclear yield test effort as well. There is the twofold problem of both detecting, and then fixing, faults in stockpile weapons. The Department of Energy estimates that the likelihood of serious stockpile problems during a shorter-duration freeze is low, but not zero. It is also true that most or all weapons of a kind—for example the Minuteman III warheads—would fail together. Thus large "chunks" of our deterrent would be placed at risk during a nuclear freeze, not just selected individual weapons. A test ban at this time would also curtail development of a badly-needed data base on the new weapon designs going into production now for the modernized strategic, theatre, and tactical nuclear deterrent forces of the 1980s and 1990s.

The question of nuclear stockpile confidence, even in a test ban regime of "fixed duration," is perhaps the most pressing issue from the military point of view. The U.S. nuclear weapons establishment—basically a complex of about a dozen major government-owned (but

mostly contractor-operated) facilities, a work force about 40,000 people, and a budget of about $3 billion—is the only source of expertise on our nuclear stockpile.

America has no "options" if our nuclear technology infrastructure becomes undermined by a nuclear freeze. The technology and advanced developments to meet future requirements, and the expertise to maintain our existing nuclear stockpile, must be provided for by the actions of the U.S. Government—there is no "second source."

Whether nuclear freeze appears as logical or illogical, as an opportunity or a danger, as something to be desired or something to be abhorred, depends on where you stand in the ideological struggle. Sadly, it appears that—to the American popular masses—that struggle has all but ended. If American voters decide, as George Kennan already has, that Brezhnev (and his successors) are in fact "men of peace," and that there is no conventional loss in Europe that could be as disasterous to America as the results of nuclear war; then the "arms race" could be ended on any terms—even those as inane as the proposed nuclear freeze.

We all agree that weapons which cannot be tested, produced, or deployed—cannot deter. If the American people are already self-deterred, then nuclear freeze makes sense and saves lots of money for tuition loans for anti-nuclear student activists.

If the debate on nuclear freeze is irrevocably linked to nuclear deterrence, then the pro-freeze advocates should offer America an alternative to the nuclear deterrence strategy, since they want to eliminate the strategy we have followed for 30 years.

JESSE HELMS.

[From Member's Report, vol. 6, No. 4, June 1982]

PRESIDENT REAGAN'S DECISION TO CONTINUE SALT POLICY IS ILLEGAL

(Remarks by Senator Steve Symms of Idaho)

REAGAN AND HAIG COVER UP SOVIET TREATY CHEATING

1980 GOP platform abandoned

Mr. President, the U.S. Government has managed to mire itself in an extraordinary policy for compliance with strategic arms limitation treaties (SALT). On the one hand, the U.S. Government covers up and apologizes for Soviet violations of the SALT II Treaty. These violations are well-known and demonstrable. This is contrary to the Republican Party Platform of 1980.

U.S. law being violated

On the other hand, the executive branch is unilaterally deactivating and limiting its own strategic forces in order to comply the SALT II and SALT I. This is in violation U.S law. Thus the U.S. Government is acting contrary to its electoral platform promises on arms control, while violating U.S. laws. Only the U.S. Senate can hold the administration accountable to the law and the Constitution regarding unilateral U.S. SALT compliance.

Soviet treaty violations are well established

There have been many significant violations of the SALT II treaty reported in the press. The evidence for these violations is well-established, and quite strong. The most important are:

The reported Soviet rapid reload and refire exercises for their giant SS-18 cold-launched ICBM.

The reported Soviet covert deployment of the camouflaged and concealed mobile SS-16 ICBM's at the Plesetsk Test Range. This activity is similar to the Soviet illegal deployment of 18 SS-9 ICBM's at the Tyuratam Test Range during SALT I.

The Soviet deployment of AS-3 Kangaroo air-to-surface missiles on 100 TU-95 Bear intercontinental bombers, in violation of several provisions of SALT II. This is also a Soviet falsification of the data exchange, calling into question all Soviet-supplied data.

The continued almost total encryption of telemetry signals from the following Soviet missile programs: the SS-NX-20 SLBM, the SS-NX-19 SLCM, the SS-18 MOD X ICBM, and the SS-20 IRBM, in violation of several provisions of SALT II.

The fact that all soviet camouflage, concealment, and deception is intended to deliberately interfere with U.S. national technical means of SALT verification (satellite reconnaissance), and therefore constitutes another Soviet SALT II violation. This violation is confirmed by a Soviet military dictionary from as early as 1966.

Why did Reagan change his policy

According to conclusive evidence, SALT I and SALT II were deceptively negotiated, unequal, destabilizing and not in the U.S. national security interest. But the United States is nevertheless still complying with both. Why?

Early in the Reagan administration, in January 1981, President Reagan called Soviet leaders liars and cheats who commit any crime to advance their objectives. In the same press conference, President Reagan declared that SALT II was unverifiable. President Reagan's concern that SALT II was unverifiable was fully consistent with his campaign statements opposing SALT II as "fatally flawed," unequal, destabilizing, and unverifiable. His concern was also fully consistent with the Republican platform's tough arms control section, which was reaffirmed by President Reagan after the election.

Senate can challenge Reagan compliance with Carter-Brezhnev plan

In February 1981, Navy Secretary Lehman stated that continued U.S. compliance with SALT I and II was illegal. Lehman's statement was also fully consistent with Reagan's own policy declarations on the subject of SALT compliance. Lehman was referring to section 33 of the Arms Control and disarmament Act of 1961, which states that U.S. military force levels can only be limited by treaties requiring advice and consent of the Senate, or by affirmative congressional legislation.

Section 33 of the Arms Control and Disarmament Act of 1961 states:

"No action shall be taken under this or any other law that will obligate the United States to disarm or reduce or to limit the armed forces or armaments of the United States, except pursuant to the treaty-making power of the President under the Constitution, or unless Authorized by further affirmative legislation by the Congress of the United States."

Strictly interpreted, section 33 states that Presidential policies to limit U.S. force levels in compliance with expired or unratified SALT treaties can be challenged at any time by the Senate.

Reagan is reducing U.S. forces by 28 percent to comply with SALT

The Reagan administration plans to unilaterally deactivate 160 Polaris SLBM's 52 Titan II ICBM's, and 80 B-52 Intercontinental bombers, all of which are counted in and limited by SALT II. These 292 strategic delivery vehicles carry 334 nuclear warheads, and comprise about 26 percent of our existing firepower or megatonnage. The United States neither asked for nor gained Soviet quids pro quo in arms control concessions before making the decision to unilaterally deactivate these forces, but this is a separate problem. More significantly, each of these deactivations could be viewed as a violation of section 33 of the Arms Control and Disarmament Act, because they violate both elements of section 33. They are occurring in compliance with an unratified SALT II treaty, and they are occurring without affirmative congressional legislation. Indeed the Titan II and B-52 deactivations are planned in actual defiance of congressional legislation, the fiscal 1983 defense authorization bill.

Reagan decision to dismantle U.S. nuclear submarines is illegal

There are several strong arguments against Polaris submarine dismantlement, in further compliance not only with SALT II, but also with SALT I. The deactivation and dismantling of Polaris submarines is being done without affirmative legislation from the Congress, which makes it illegal. Further, by dismantling Polaris in order to comply with the expired SALT I Interim Agreement, the U.S. Government is acting in violation of the law. There has been no binding legal consent of the Senate for continued U.S. compliance with the SALT I Interim Agreement beyond October

1977. The dismantling of Polaris submarines is required in order to stay under the U.S. submarine and SLBM limits of the expired SALT I agreement, 41 submarines with 656 SLBM's, as new Trident submarines are built. The United States could go up to 44 submarines carrying 710 SLBM's by retiring our 52 Titan II ICBM's, instead of Polaris submarines. Titan II deactivation is planned anyway, but this option is being completely ignored. The United States is thus dismantling two Polaris submarines for every new Trident submarine going on sea trials, of which there are now two.

As specified in section 33, the treaty-making power includes the advice and consent of the Senate. The Senate has not given legally binding advice and consent on continued U.S. compliance with SALT I beyond its expiration in October 1977. The U.S. Senate did pass a concurrent resolution in September 1977 supporting the Carter administration's policy of indefinite continued U.S. SALT I compliance, but this resolution does not have the force of law, and in any case it was not even acted upon by the House. Further, there has never been affirmative legislation by the Congress specifically authorizing the deactivation and dismantling of Polaris submarines.

In sum, Polaris submarine dismantlement in compliance with SALT I is clearly illegal. It violates both elements of section 33. There can be no dispute with the above facts.

There are several additional important facts relating to deactivation and dismantlement of Polaris submarines.

To comply with SALT, 187 million defense dollars are being used to disarm 10 U.S. subs which cost $3.5 billion

First, 2 of the 10 Polaris submarines have already been dismantled illegally and rendered inoperable under the Carter administration. The third of the 10, the U.S.S. *Patrick Henry*, is planned for deactivation and dismantling beginning next month, in June 1982. The remaining 7 of the 10 Polaris subs are also planned for deactivation in succession.

Second, the cost of dismantling each submarine is about 15.7 million dollars. These funds are drawn from Navy operations and maintenance funds. Thus the total cost of dismantling the eight remaining Polaris submarines is about 125.6 million dollars. These vital operations and maintenance funds have never been specifically authorized by Congress for the purpose of dismantling Polaris submarines. Instead of being used for the dismantling of good submarines, these O. & M. funds should be diverted instead to improving readiness and military capability.

Third, the total investment in procurement and operation of the 10 Polaris submarines over the last 2 years is about $3.5 billion dollars. Thus the continued deactivation of Polaris subs will throw away $3.5 billion dollars worth of good military capability.

Fourth, if the eight remaining Polaris subs are not dismantled, but are instead retained as attack or torpedo submarines, they will require some additional investment to cover overhaul, refueling and operations. These overhaul and refueling costs are estimated to be about $500 million dollars, spread over several years.

Fifth, the United States now has only 94 attack submarines in its entire fleet, compared to about 189 for the Soviets. If the United States retains these 8 good Polaris submarines, our attack submarines force will be increased to 102. We need every attack submarine that we can get, and the Polaris subs are still in good working order.

Sixth, apologists for the Soviets claim that the Soviets have reportedly dismantled the missile bays on about four or more of their comparable earliest Y class submarines, in compliance since 1977 with the expired SALT I agreement. I would point out, however, that these submarines are evidently not being retired, as is currently planned for our Polaris subs, but are instead being reportedly converted into either cruise missile or attack submarines. Thus the Soviets do not throw away good weapons. The Soviets continue to use good submarines. We should do the same.

Seventh, the Secretary of the Navy, the Honorable John Lehman, has confirmed all of the above facts over a year ago. In February, 1981, Secretary Lehman stated that U.S. unilateral compliance with both SALT I and SALT II was illegal. He was referring to continued Polaris deactivation in violation of section 33 of the Arms Control and Disarmament Act. John Lehman was right. The United States should no longer illegally comply with an expired SALT I agreement. Soviet SALT compliance itself has been widely questioned, but that is a separate problem. It is a strange situation, however, when the United States is illegally complying with SALT I, while the Soviets have illegally violated SALT I.

Reagan rejects deployment of 100 U.S. ICBM's to comply with SALT ceilings

In another example of violation of section 33, the Reagan administration initially rejected deployment of 100 stockpiled Minuteman III ICBM's in place of Minuteman II's because this would have eventually violated SALT II. Defense Secretary Weinberger actually stated in a March 24, 1981 letter to Senator Schmitt that—"Additional Minuteman III's would provide very limited military utility and could impact future arms control negotiations . . ." Minuteman III deployment was authorized by Congress in both fiscal year 1981 and fiscal year 1982. Thus here is another example of affirmative legislation actually being violated in order to comply with the unratified SALT II treaty.

SALT limits versus ICBM deployment options

Finally, there are reports that the Reagan administration has been considering a "dense pack" deployment mode for the new MX ICBM. But "dense pack" would entail building new or relocating old ICBM silos, either of which would clearly violate article IV of the SALT II treaty. There are reports that MX deployment in the dense pack configuration was fully acceptable technically and militarily, but that the Reagan administration has been reluctant to approve "dense pack" because it violates SALT II. So here is another example of a U.S. deployment option which has been delayed and may be rejected because it would violate an unratified SALT II treaty. Thus, it is another violation of section 33.

In the cases of continued U.S. compliance was authorized by Congress with the expired SALT I and the unratified SALT II, there has been neither legally binding Senate advice nor consent, and in fact, in several cases, affirmative legislation has been ignored.

Navy Secretary overruled by State Department

As noted, Secretary Lehman's February 1981 statement that U.S. continued compliance with SALT I and II was illegal was well founded, and fully consistent with President Reagan's campaign statements, the Republican platform and Reagan's January 1981 statements. Hence many observers were surprised when in February 1981 Lehman was summarily reprimanded and the State Department quickly proclaimed that the United States and the Soviets would continue indefinitely to comply with SALT I and II as long as neither side did anything to "undercut" the agreement.

There were reports that President Reagan was puzzled by the reprimanding of Lehman for merely advancing Reagan's own declared anti-SALT II policy, but Reagan did nothing to change the U.S. unilateral SALT II compliance policy. Leaving aside the vague meaning of actions which undercut SALT, unilateral U.S. SALT II compliance is unsatisfactory. In addition to violating section 33 of the relevant law, the Reagan administration, like the Carter administration before it, has failed to even request a Soviet statement of their own compliance intentions. Perhaps this is because the Soviets have stated authoritatively several times that they are not bound to comply with SALT II unless the United States ratifies it. Thus the Soviets have all the benefits of United States compliance with SALT II, which is occurring in violation of U.S. law, while themselves accepting none of the obligations. Soviet violations of SALT II are consistent with their disavowal of the treaty.

It is unrealistic for the United States to unilaterally comply with a treaty which the Russians have said they will not comply with and which we cannot verify. In sum, the United States is still unilaterally complying with SALT II, despite President Reagan's expressed opposition to it, its nonverifiability, its failure to be ratified, its actual and illegal constraining effect on U.S. Forces, and Soviet disavowals and violations.

Haig denies evidence of Soviet cheating

On May 12, 1982, Secretary of State Haig testified to the Senate Foreign Relations Committee that "SALT II was dead." Nevertheless, he also noted that the United States continued its policy of complying with SALT II. He added insistently that there was absolutely no evidence of any Soviet violations of SALT II. Moreover, in a press conference that same week, President Reagan announced that both the U.S. and the U.S.S.R. were complying with what he called the "monitoring provisions" of SALT II, without defining what was meant by this new and vague term. Then strangely, on Thursday, May 13, in an editorial, the Washington Post significantly qualified the SALT II compliance situation. The Post wrote that "most of its (SALT II's) terms are being respected by the United States and the Soviet Union. If the Soviets are violating parts of SALT II, then they are in violation of the whole treaty. Either the Soviets are complying with SALT II, or they are not. President Reagan's reference to only the so called "monitoring provisions," and the Post's

qualification that only "most" of SALT II's provisions were being respected seem to fly in the face of Secretary Haig's flat assertion that there was no evidence of Soviet SALT II violations. On May 23, 1982, Secretary Haig stated on national television that the United States and the U.S.S.R. continue to observe "some" of SALT II's constraints. This is an even greater qualification of how much of SALT II the Soviets may be complying with. The Director of the Arms Control Agency, Eugene Rostow, has stated recently that both the United States and the U.S.S.R. are observing in "general" the SALT II limits. "General" compliance is a new concept, and an even greater indictment of Soviet behavior.

In fact, the Reagan administration has a wholly contradictory policy regarding U.S. compliance with SALT II. President Reagan's own campaign statements, platform, and January 1981 statements on the undesirability and the unverifiability of SALT II are being completely denied by Secretary Haig. At the same time that the State Department declares SALT II to be dead, the United States is unilaterally complying and denying the firm evidence of Soviet violations. And further, the United States continues to significantly constrain its own programs in illegal compliance.

The Washington Post of May 23, 1981, stated what was probably the real reason that the State Department denies the reports of Soviet SALT violations. According to Michael Getler:

"Some Reagan administration officials remain suspicious of what the Soviets are doing under SALT II restrictions, which are still being informally obeyed. However, sources say the administration refuses to bring complaints before the standing consultative commission, whose meetings it attends, for fear of legitimizing SALT II." (P.A. 13)

But U.S. compliance actions have already legitimized SALT II. Meanwhile, the United States will not face up to its suspicions about Soviet violations by challenging the Soviets at the SCC. This again illustrates the contradictory nature of U.S. SALT compliance policy. Thus the United States is in fact illegally complying with SALT II, while the Soviets are violating SALT II.

Reagan rhetoric contradicted by Reagan policies

Meanwhile, President Reagan's own innate suspicions of Soviet intentions in arms control negotiations and compliance have resurfaced. In his Eureka College "Start" speech of May 9, 1982, President Reagan stated:

"So far, the Soviet Union has used arms control negotiations primarily as an instrument to restrict U.S. defense programs, and in conjunction with their own arms buildup, as a means to enhance Soviet power and prestige. Unfortunately, for some time suspicions have grown that the Soviet Union has not been living up to its obligations under existing arms control treaties."

Exposing Soviet violations

Several Senators, James Buckley, Jake Garn, Gordon Humphrey, a former Defense Secretary, Melvin Laird, and a former Chief of Naval Operations, Admiral Zumwalt, have all taken the lead in exposing Soviet SALT violations over the years.

Probably the most authoritative accusation of Soviet SALT violations ever made needs citation. Mr. Paul Nitze, who is now the Chief U.S. Negotiator for Intermediate Range Nuclear Force Negotiations, was asked by Senator Zorinsky during Senate Foreign Relations Committee SALT II hearings in 1979: "Do you know of any violations that have come before the SALT I Standing Consultative Commission that were not resolved under SALT I?" Mr. Nitze replied:

"No, but how were they resolved? They were resolved by accepting what had been done in violation."

Thus Paul Nitze himself, one of our most knowledgeable and experienced SALT negotiators, has strongly bolstered the thesis that there have in fact been Soviet SALT violations.

In conclusion, as President John F. Kennedy stated on March 2, 1963 in regard to the limited test ban treaty then under negotiation with the Soviets:

"We know enough now about broken negotiations, secret preparations and the advantages gained . . . never to offer again an uninspected moratorium."

President Kennedy's admonition is probably the best approach to currently popular notions proposing an unverifiable United States-Soviet nuclear "freeze." The Brezhnev-Kennedy-Hatfield nuclear freeze proposal is a good example. It is unverifiable, as is SALT II, as President Reagan has pointed out.

Arms control advances Marxist-Leninist goals

The chief enemy of arms control is Marxism-Leninism. The Soviets are indeed waging ideological warfare through arms control negotiations. As V.I. Lenin stated long ago:

"Every 'peace program' (i.e. such as a nuclear weapons freeze) is a deception of the people and a piece of hypocrisy, unless the principal object is to explain to the masses the need for a revolution."

[From the New York Post, July 22, 1982]

UNITED STATES PROBES ILLEGAL RUSSIAN NUKE TEST

(By Rowland Evans and Robert Novak)

WASHINGTON.—A Soviet underground nuclear explosion—believed by U.S. intelligence to have far exceeded the limits of the Underground Test Ban Treaty—has been under urgent study by the White House ever since seismic instuments around the world picked it up July 4.

Wryly known as "the July Fourth firecracker," the underground test was measured at more than 250 kilotons—about 20 times the size of the World War II Hiroshima blast—by seismic monitors strategically placed near Soviet territory.

The limit on all underground explosions is 150 kilotons.

While the Soviet test has been carefully kept under wraps, the U.S. will confront Moscow with its evidence and demand an explanation.

Some officials say President Reagan's decision not to continue so far-sterile negotiations with the Russians on a new treaty that would ban all nuclear tests, both above ground (now banned) and below ground (now limited to 150 kilotons), was partly dictated by the July 4 blast.

The reason: The Soviet practice of what one official termed "systematic cheating" could place the U.S. at a dangerous disadvantage if it agreed to stop all testing and dismantled its testing apparatus.

Proving Soviet cheating in its underground nuclear testing is not easy because of the different readings from seismic monitoring stations.

But after making full allowance for discrepancies, U.S. intelligence officials have given the July 4 explosions a "mean," or average reading, of more than 250 kilotons—about 20 times the size of the World War II Hiroshima blast.

Since the U.S. and the Soviets put the 1976 Underground Test Ban Treaty into effect by mutual agreement—without Senate ratification—the Russians have exploded no fewer than 14 nuclear devices believed to have been higher than the permitted level.

The largest was on Sept. 14, 1980, recorded at 315 kilotons.

The July 4 test was the second largest.

Soviet cheating on various U.S.-Soviet nuclear treaties is regarded within the Reagan Administration as virtually endemic.

But final, hard proof is difficult to come by.

Intelligence officials also have been disturbed recently by signs of Soviet actions in the anti-ballistic missile area that also may be raised at the next meeting of the Standing Consultative Commission, the joint U.S.-Soviet body that is supposed to enforce compliance.

Disturbing evidence of new Soviet missile construction has raised the possibility that Moscow is building a country-wide anti-missile system.

The ABM treaty limits both sides to two anti-missile sites; both subsequently agreed to a single site on each side.

The Soviet site protects Moscow alone.

The ABM treaty comes up for a periodic five-year review this fall.

Reagan officials are studying proposals for a safer system of inspection to assure Soviet compliance, and they may use the five-year treaty review session to try and obtain it.

[From the New York Post, July 21, 1982]

SOVIETS CHEAT ON NUKE TESTS

(By Niles Lathem)

WASHINGTON.—The Soviet Union may have violated treaties on nuclear weapons testing, the Reagan Administration charged yesterday.

And the U.S. said it would make a major push to include strong checks and balances in future treaties to prevent cheating.

Senior White House and State Dept. officials told reporters that seismic signals from the Soviet Union over the past eight years creates great doubts that the Kremlin is abiding by treaties signed with the U.S. in 1974 and 1976.

"On several occasions seismic signals from the Soviet Union have been of sufficient magnitude to call into question Soviet compliance," said a senior official on the National Security Council.

As a result President Reagan made a decision Monday to try and renegotiate these treaties to include adequate verification measures.

The Administration remains committed to a test ban treaty, the official said.

But any treaty must include improved "verification capabilities that would justify confidence in Soviet compliance.

"Uncertainty about the Soviet Union is what makes it essential that we get better verification," he said.

The protocols known as the 1974 Test Ban Treaty and the 1976 Peaceful Nuclear Explosions Treaty limit blasts to 150 kilotons—equivalent to 150,000 tons of dynamite.

The officials charged however that the two treaties do not contain adequate verification measures to catch Soviet cheating.

And so far Moscow has been unwilling to ensure effective verification measures, the officials charged.

"The Soviets have simply refused to accept measures to ensure effective verification."

Under the present arrangement the two superpowers watch each other's nuclear testing with spy satellites and seismic testing equipment.

But the Soviet Union has repeatedly refused to allow U.S. or other Western officials to participate in on-site inspections.

Senator EAST. Our next witness is Mr. Richard Richstein.

We appreciate you coming forward this morning.

Before we turn to your testimony, I would like as chairman to summarize the testimony of the previous witnesses.

First, I think all three Senators represent a position which holds that this resolution clearly attempts to achieve a de facto recognition or ratification of the SALT II Treaty. While all three Senators did allude to this, it is important to acknowledge that this is not a universal opinion of the Senate.

Second, I would like to point out for the record that Senate Joint Resolution 212 asserts that President Reagan has declared that the United States would continue to refrain from actions that would undercut existing SALT agreements. In fact, the President has not made any such statement.

What the President did say was that the United States will refrain from actions which undercut existing strategic arms agreements as long as the Soviet Union shows equal restraint. He made no reference to SALT I or SALT II. SALT I has expired. SALT II has never become operative. So when he says actions which engender existing strategic arms agreements, he implies existing agreements that have the force of law.

There is a slight of hand when a newspaper account of the President's general policy statements is seized upon and placed in a resolution. Senate Joint Resolution 212 represents this type of maneu-

ver, attempting to twist a media report into a Presidential embracement of SALT II.

Certainly there is no demonstrable evidence that the President has taken this position. The resolution expresses the wish of the Senate Foreign Relations Committee, but seems to rest on the erroneous assumption that the President has expressed his desire that we concur in his ratification of SALT II.

I do not need to be persnickety on the treatymaking process but, after all, the treatymaking process does not work in such a cavalier fashion as this resolution presupposes. That is clear from the testimony of the previous gentlemen and as one member of the subcommittee, I would like to put that in the record..

Third, and in conclusion, I discern from the panel's comments that the word "shall" is very important. This resolution is not merely a sense of the Senate. It would be binding, with the force of law.

I might note, under article 19 of the treaty, this measure would be contrary to the treaty itself. It says the treaty shall be subject to ratification subject to constitutional procedures of each party. That is sentence No. 1. Sentence No. 2 says this treaty shall enter into force on the day of exchange of instruments of ratification. By the terms of the treaty itself, only then would it become law. It certainly cannot go into operation by a mere resolution of the House and the Senate.

Those are matters legitimately before us. I think they are clearly within the purview and scope of the Judiciary Committee and particularly the Separation of Powers Subcommittee. Obviously these other gentlemen indicated deep concern about SALT II in terms of problems properly before the Armed Services Committee and properly before the Foreign Relations Committee.

Salt II is a fatally flawed treaty, to use the President's words. There are proper forums for taking up those matters too, but I am suggesting that the record show these three distinguished gentlemen, beyond the merit of SALT II, clearly are somewhat appalled by the constitutional infirmities involving the separation of powers. They represent a somewhat strong and prevalent view in the U.S. Senate today, and I am compelled to associate myself with their view.

Mr. Richstein, as our time is limited, we shall now hear your testimony.

Mr. Richstein is General Counsel of the U.S. Arms Control and Disarmament Agency. He has a long and distinguished career. I welcome you and thank you for helping us evaluate this proposal.

Mr. Richstein, since all written statements will be made a part of the record, I would ask if you can summarize what you think are the essential matters. Your written statement, of course, will be made a part of the record

STATEMENT OF A. RICHARD RICHSTEIN, GENERAL COUNSEL, U.S. ARMS CONTROL AND DISARMAMENT AGENCY

Mr. RICHSTEIN. May I say, it is a pleasure to appear here today to participate in the discussion on Senate Joint Resolution 212.

I would like to say preliminarily, in view of the questions that have arisen, that Mr. Rostow regretted very much that he could not be here today but this morning he learned of his chores. The White House wanted him to do these in connection with the nuclear freeze and he is busily engaged in that. I know that he regrets not being here.

I would like, with your permission, to read as far as I can what I consider to be a very brief statement and then take your questions when I finish.

The letter of invitation to appear before you expresses the concern of the subcommittee that the "proposed resolution seeks to circumvent the treatymaking process by providing de facto ratification of the SALT agreements through an instrument requiring only a simple majority in the Senate and improperly involving the House of Representatives."

A careful reading of Senate Joint Resolution 212, together with the accompanying report (S. Rept. No. 97-493), indicates that the intent of the Senate Foreign Relations Committee was to give the "full force and effect of law" to President Reagan's policy of interim restraint provided the Soviet Union shows equal restraint. The President's statement, as quoted in the Senate Foreign Relations Committee report, declared—and I would like to say I am quoting from the Senate report and I fully agree with what has been said here today about what the President actually said.

But quoting from the Foreign Relations Committee report, it declared:

"As for existing SALT agreements, we will refrain from activities which undercut them as long as the Soviet Union shows equal restraint."

Senate Joint Resolution 212, if enacted, thus would give the effect of law to a unilateral statement of policy. It would, however, although requiring compliance by the President, confer no rights upon the U.S.S.R. to demand enforcement. For this reason, it would not be equivalent to ratification of SALT II. Further, it would create no binding international obligation to extend the SALT I interim agreement.

Nevertheless, the effect that the proposed resolution would have on the authority and responsibility of the President for the negotiation of strategic arms control agreements needs careful consideration. Article II, section 2, of the Constitution provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." It is clear from both the language of the Constitution and the practice that has developed under it that it is the President who is responsible for the conduct of foreign policy and negotiates the treaties which are sent to the Senate for advice and consent. By giving legally binding effect to the President's announced policy of interim restraint, the proposed resolution would affect the President's ability to negotiate strategic arms agreements in the START and INF talks currently underway in Geneva.

As long as our commitment not to undercut SALT is a statement of national policy, and not legally binding, it will remain clear to the Soviets that we do not agree with them that parity exists between the strategic arms of each side. Once that policy becomes a

law, however, our ability to negotiate the President's proposed strategic arms reductions proposal to correct the current strategic imbalance will be adversely affected. The proposed resolution would not allow the President to modify the existing policy even for considerations of supreme national interest The resolution could thus inhibit the development and deployment of new weapons systems necessary to our national security in the event that these systems might be considered to undercut the SALT agreements. Furthermore, the language of the President's statement, while perfectly appropriate as a general statement of policy which can be developed and used in a flexible way over the course of time, is vague and possibly unworkable as a legal standard which must be strictly applied and interpreted under U.S. law. The proposed resolution would thus tie the President's hands in his attempt to carry out his responsibilities in vital areas of our foreign policy.

I am aware that the subcommittee is also considering questions that relate to whether the joint resolution presents separation of powers questions insofar as it allows the House of Representatives to become involved in matters relating to treaties. I note in this regard that there is a long-established practice by which a majority of both Houses may consent to executive agreements. Indeed, in 1844 the State of Texas was admitted to the Union and in 1898 the territory of Hawaii was annexed by the United States, not pursuant to a two-thirds votes of the Senate, but through joint resolutions with the approval of the President. A more immediate example is that of the SALT I interim agreement, which was presented to the Congress as an executive agreement and was approved by joint resolution after a majority vote of both Houses.

Finally, on section 33, in its letter, the subcommittee also expressed its concern whether Congress has the authority under section 33 of the Arms Control and Disarmament Act of 1961 to lay aside SALT II and revive SALT I. Section 33 of the act prohibits any action that:

> * * * under this or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty-making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.

The language and legislative history of the act make clear that section 33 is confined to legally binding arms control arrangements effected by international agreements entered into pursuant to the act or other law. This section was designed to preserve, and not to alter, the respective constitutional authority and prerogatives of the two branches with respect to international arms control obligations. Indeed, it could hardly have been otherwise. Congress, after all, has no power to modify the Constitution. Accordingly, since approval of the SALT agreements has not been requested by President Reagan, the joint resolution cannot be used to require the President to accept an international agreement that he does not seek. Since a joint resolution cannot become law without the President's signature in any event, nothing Congress can do could even superficially threaten the President's inherent authority in the field of foreign affairs. The Senate, equally, can preserve its prerog-

atives by the simple expedient of refusing to vote for Senate Joint Resolution 212.

In summary, although I do not, as I have indicated in my discussion, necessarily agree with certain of the specific concerns raised in your letter, I share the subcommittee's general concern about the effects of the proposed resolution.

I am now willing to answer any questions you may have.

Senator EAST. Thank you, Mr. Richstein.

Senator SYMMS. Thank you very much, Mr. Chairman, for allowing me the opportunity to impose on your time as chairman of the subcommittee to ask another question.

I wanted to start off by reading a couple of quotes. This one says:

> We have had a SALT I agreement with the Soviet Union since 1972. It expired in 1977, but we and the Soviet Union announced simultaneously that its terms remains in effect despite the provisions of an American statute, section 33 of the ACDA act which specifies that the United States can undertake arms limitations obligations only by treaty or statute. Far from stabilizing world politics, SALT I has been part of the most turbulent and dangerous period of the Cold War.

That is paragraph 1 and then the closing paragraph of this article:

> The kind of SALT II agreement the Carter administration is so frantically trying to sell the country is not a step toward detente or toward peace but an act of appeasement which can only invite more Soviet pressure and more risk. It would freeze us in a position of inferiority, deny us the opportunity to redress the balance, weaken our alliances and isolate us. It would be a step toward war, not peace.

The reason I read that, Mr Chairman, and this is part of an article, by Eugene Rostow in 1978 when he was at the Yale Law School—I believe that is when he made that statement.

These quotations provide the context for the question that I would like to propose to our distinguished ACDA witness here this morning. I have already mentioned the Fourth of July firecracker, that the Soviets tested a nuclear weapon underground on July 4 which exhibited an estimated yield of over 250 kilotons.

No. 1, are those reports accurate?

Mr. RICHSTEIN. Sir, I came prepared today to discuss the process of the interaction between Congress and the President the treaty-making process and in connection with executive agreements and particularly as that process affects the arms control negotiations.

I can take your question for the record, if we are going to get into violations, because I think we will get into a classified area and I would be able to submit that for the record.

Senator SYMMS. That would be fine. I hereby submit that question for the record for ACDA to answer as soon as possible. It was also reported that the Soviet Union nuclear weapons test in September 1980, had a yield of 315 kilotons, and that there have been 14 nuclear tests since 1976 with a yield of over 150 kilotons, limit of the Threshold Test Ban Treaty. In my opinion those tests certainly violate and undercut the Threshold Test Ban Treaty. What are those implications of the Soviets undercutting the test ban treaty for the SALT agreements?

I hereby submit these questions to you in writing for the record.

Back to your testimony. Is there any reason, in view of the Rostow quote I gave you, for Rostow to change his mind since 1978 on whether the United States should comply with SALT I and

SALT II? Why would it be in the national policy to comply with SALT I and SALT II when these are unratified? You alluded to it in your testimony but is there any reason for the security of this country why the United States should make an effort to comply with SALT II?

Mr. RICHSTEIN. The term "comply" I think, as you use it, Senator, may be too broad, without getting overly legalistic. I would like to make a point with regard to the treatymaking process and the stated intention of the President not to undercut those agreements; that these were statements of policy and, similarly, as I understand it, much before my time here, that the parallel statements that were made after the expiration of SALT I, similarly were made quite clear to be statements of policy and not binding. So I think in terms of using the word "comply," we should keep in mind that what was being stated was a flexible policy which I take it has been considered by all concerned with the national security of the United States and had been decided on in the way enunciated.

Senator SYMMS. Mr. Chairman, I imposed way too much on the committee's time. I want to thank you again for pursuing this and I would like to offer to you, Mr. Richstein, my assistance and also to Dr. Rostow, in encouragement to you to recognize the severe threat posed by the Soviets that I think the United States faces. I would just make reference here, Mr. Chairman, in closing—here is the Washington Times news report. This was dated July 29:

> The House voted yesterday restrictions on President Reagan that prohibit military spending if in violation of SALT I and SALT II, strategic arms limitation treaties.

The sponsor of the motion, Les Aspin, Democrat of Wisconsin, acknowledged that this action was back-door ratification of this controversial 1979 SALT II Treaty.

Here we have quoted, Dr. Rostow that SALT II leads toward war, not peace. And here we are seeing the possibility of getting SALT II ratified through the back door.

As Senator Helms pointed out, the real survival of the United States would be critically affected by compliance with the SALT II Treaty. I believe that a high Reagan verification official has been quoted at other times as saying he had grave concerns about Soviet compliance with SALT I and SALT II. An ACDA spokesman has stated that there is divided opinion within the administration over whether there have been SALT violations and Rostow himself has said that the Soviets have violated the U.S. unilateral statements of SALT I and have deployed mobile ICBM's in violation of SALT II. I think there is so much overwhelming evidence that SALT I and II have been violated by the Soviets.

So I would just like to leave by saying, Mr. Chairman, that I think this is an entirely critical issue that you have before this subcommittee and I thank you again for having these hearings and I think we should continue to pursue all angles to be sure that the Senate does not pass the resolution that the Foreign Relations Committee passed.

With that, I yield the floor back to the distinguished chairman of the subcommittee.

Senator EAST. I thank Senator Symms for his valuable testimony and his support and interest. Also I would like to give him the lion's share of the credit for initiating this inquiry. He has made an invaluable contribution.

I would also like to underscore a point Senator Symms has made. I saw the article he referred to in which the reporter states that the obviously delighted sponsor of the resolution, Les Aspin, acknowledged that his motion was a back-door ratification of the controversial 1979 treaty. There are a number of people in the Senate, including Senator Helms and myself, who recognize these efforts as part of the nuclear freeze movement. All of a sudden there are a lot of bush fires set to create a mood or climate which would enable an indirect ratification of an unacceptable treaty. Clearly, this can be done by a joint resolution when the treaty is before the Senate Foreign Relations Committee and must be considered as a treaty. That is the fundamental issue of debate that I am attempting to examine as chairman of the subcommittee.

Our time again becomes precious and before you know it we will be into rollcalls on the balanced budget. This great place is run like a fire station, you know. People running in and out in response to bells, I am deeply sensitive to that.

Mr. Richstein, I had an opportunity to get your statement in advance. I think it is excellent.

Let me just ask you one question and then we shall allow you to depart as I know you have a demanding schedule.

It is my understanding that your statement is generally supportive of the concerns of the subcommittee. I am not suggesting, of course, that you are embracing everything we have said here this morning. I would not ask any mortal to do that.

But it does seem from a reading of your statement, that you share the subcommittee's concern that the Presidential prerogative in the field of foreign policymaking, disarmament, and in the treatymaking process would be severely undercut by this resolution.

As a representative of the executive branch, you are suggesting that Senate Joint Resolution 212 raises serious deep separation of powers problems in terms of Presidential prerogatives and again in terms of arms reduction, arms negotiation, arms policy of the United States, and in terms of the foreign policy of the United States. You fear that ultimately congressional action will be taken whether it is an initiation of foreign policy, an initiation of arms reduction, or whether it more specifically concerns treaties, treaty ratification, or executive agreements which clearly eclipse executive initiatives.

Am I correct in my understanding of your testimony?

Mr. RICHSTEIN. Mr. Chairman, I think you have put it very well and you probably put it better than myself. It is safe to say that we do have those concerns. In practice, as we see it, for almost 200 years it has been well established that the President speaks for this country in foreign affairs. He is the leader in foreign policy. It does not mean that the Congress, the Senate, is excluded from that. Of course not. We see this resolution then as raising serious concerns as it begins to intrude on his ability to negotiate in this area of foreign policy. It is extremely important.

Senator EAST. Again, I appreciate your testimony and your comment on my summation of it. Reminded of your busy schedule and ours, too, unless you have farther comments or questions, I wish to thank you for coming. You have given us very valuable testimony

Thank you, sir.

[The prepared statement of Mr. Richstein follows:]

Prepared Statement of A. Richard Richstein

Mr. Chairman and Members of the Committee:

It is a pleasure to be here today to participate in the Subcommittee's Hearings on S.J. 212, a Joint Resolution "with respect to nuclear arms reductions."

Relationship To Strategic Arms Negotiations

The letter of invitation to appear before you expresses the concern of the Subcommittee that the "proposed resolution seeks to circumvent the Treaty-making process by providing de facto ratification of the SALT Agreements through an instrument requiring only a simple majority in the Senate and improperly involving the House of Representatives."

A careful reading of S.J. 212 together with the accompanying report (S.Rep. No. 97-493), indicates that the intent of the Senate Foreign Relations Committee was to give the "full force and effect of law" to President Reagan's policy of interim restraint provided the Soviet Union shows equal restraint. The President's statement, as quoted in the Senate Foreign Relations Committee Report, declared:

> "As for existing SALT Agreements, we will refrain from activities which undercut them as long as the Soviet Union shows equal restraint."

S.J. Res. 212, if enacted, thus would give the effect of law to a unilateral statement of policy. It would, however, although requiring compliance by the President, confer no rights upon the U.S.S.R. to demand enforcement. For this reason, it would not be equivalent to ratification of SALT II. Further, it would create no binding international obligation to extend the SALT I Interim Agreement.

Nevertheless, the effect that the proposed resolution would have on the authority and responsibility of the Presi-

dent for the negotiation of strategic arms control agreements needs careful consideration. Article II, Section 2, of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." It is clear from both the language of the Constitution and the practice that has developed under it that it is the President who is responsible for the conduct of foreign policy and negotiates the treaties which are sent to the Senate for advice and consent. By giving legally binding effect to the President's announced policy of interim restraint, the proposed resolution would affect the President's ability to negotiate strategic arms agreements in the START and INF talks currently underway in Geneva.

As long as our commitment not to undercut SALT is a statement of national policy, and not legally binding, it will remain clear to the Soviets that we do not agree with them that parity exists between the strategic arms of each side. Once that policy becomes a law, however, our ability to negotiate the President's proposed strategic arms reductions proposal to correct the current strategic imbalance will be adversely affected. The proposed resolution would not allow the President to modify the existing policy even for considerations of supreme national interest. The resolution could thus inhibit the development and deployment of new weapons systems necessary to our national security in the event that these systems might be considered to undercut the SALT agreements. Furthermore, the language of the President's statement, while perfectly appropriate as a general statement of policy which can be developed and used in a flexible way over the course of time, is vague and possibly unworkable as a legal standard which must be strictly applied and interpreted under U.S. law. The proposed resolution would thus tie the President's hands in his

attempt to carry out his responsibilities in vital areas of our foreign policy.

I am aware that the Subcommittee is also considering questions that relate to whether the Joint Resolution presents separation of powers questions insofar as it allows the House of Representatives to become involved in matters pertaining to treaties. I note in this regard that there is a long-established practice by which a majority of both houses may consent to executive agreements. Indeed, in 1844 the State of Texas was admitted to the Union and in 1898 the territory of Hawaii was annexed by the U.S., not pursuant to a two-thirds votes of the Senate, but through joint resolutions with the approval of the President. A more immediate example is that of the SALT I Interim Agreement, which was presented to the Congress as an executive agreement and was approved by Joint Resolution after a majority vote of both houses.

Section 33.

Finally, in its letter, the Subcommittee also expressed its concern "whether Congress has the authority under Section 33 of the Arms Control and Disarmament Act of 1961" to "lay aside" SALT II and "revive" SALT I. Section 33 of the Act prohibits any action "under this or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty-making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States." The language and legislative history of the Act make clear that Section 33 is confined to legally binding arms control arrangements effected by international agreements entered into pursuant to the Act or other law. This section was designed to preserve, and not to alter, the respective constitutional authority and prerogatives of the two branches with respect to international

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arms control obligations. Indeed, it could hardly have been otherwise. Congress, after all, has no power to modify the Constitution. Accordingly, since approval of the SALT agreements has not been requested by President Reagan, the Joint Resolution cannot be used to require the President to accept an international agreement that he does not seek. Since a Joint Resolution cannot become law without the President's signature in any event, nothing Congress can do could even superficially threaten the President's inherent authority in the field of foreign affairs. The Senate, equally, can preserve its prerogatives by the simple expedient of refusing to vote for S.J. Res. 212.

Conclusion

In summary, although I do not, as I have indicated in my discussion, necessarily agree with certain of the specific concerns raised in your letter, I share the Subcommittee's general concern about the effects of the proposed resolution. I am now willing to answer any questions you may have.

Senator EAST. Would Dr. Almond, Mr. Kamenar, and Professor Rees please come forward?

These gentleman have very distinguished credentials. Professor Rees teaches constitutional law at the University of Texas Law School in Austin, Tex. Mr. Kamenar is director of litigation of the Washington Legal Foundation, and Dr. Almond is a specialist in international law at the National War College here in Washington.

It would be useful and agreeable to all parties concerned if Dr. Almond could go first, followed by Mr. Kamenar and then Professor Rees.

What I would like to do, because of time constraints, is ask each of you to summarize your written statements. They will be made a part of the record.

Dr. Almond, we welcome you.

STATEMENT OF DR. HARRY ALMOND, NATIONAL WAR COLLEGE, WASHINGTON, D.C.; PAUL KAMENAR, DIRECTOR OF LITIGATION OF THE WASHINGTON LEGAL FOUNDATION, WASHINGTON, D.C.; AND PROF. GROVER REES, UNIVERSITY OF TEXAS LAW SCHOOL, AUSTIN, TEX.

Mr. ALMOND. Thank you, Mr. Chairman.

I am pleased to appear before this committee. I appear primarily as an authority on international law rather than on constitutional law.

For that reason, I will defer to my colleagues who are here on the panel who I believe are experts in constitutional law. However, I can make a few observations that will overlap some of the views that they are making and which may be helpful in the deliberations of this committee.

With the permission of this committee, I will be submitting my statement which will give my remarks elaboration. Owing to the short time associated with preparing the paper, it is rather informal in its present state.

I must say at the outset that I am appearing here, and I wish to thank you for permitting me to do so, as an independent witness. I do not represent the views of the U.S. Government or any of its agencies, although I am presently assigned to the National War College where I am a professor in public international law.

I agree with everything Mr. Richstein of ACDA said. It seems to me he has very concisely indicated the position that I would also like to take but with a few observations as they relate to the ambiguities in the joint resolution as I see them.

One of the foremost ambiguities in Senate Joint Resolution 212, paragraph 3 appears in the term "interim restraint regime". That is ambiguous because it could be read to mean that the draftsmen of the resolution had expected or intended that we establish the kind of regime that international lawyers normally associate with a treaty regime. That language would cause me a great deal of trouble if it were to remain in the joint resolution, largely because we cannot establish treaties by legislation alone.

It could be cured, I think, in part by adopting what Senator Helms has suggested as a change of language, replacing "shall" in the earlier part of paragraph 3 by "should." This would transform the mandate to the President's discretion.

The term "equal restraint" is also ambiguous. It is ambiguous in a differing sense because a joint resolution, as our earlier speakers have indicated, has the force of law. As law it imposes a mandate on the President to execute that law and somehow to satisfy what I refer to as the ambiguities in establishing, maintaining, verifying, and assuring that whatever the meaning of "equal restraint" might be it must be established pursuant to the joint resolution.

Clearly, of course, we can look at this from a differing perspective, that is, as a statement of policy and then, of course, we would come out with the conclusions that Mr. Richstein has already indicated

Turning back to the notion of assuring compliance: How now do we do that? We do that with "national technical means" which I am not going to consider here in detail but we also do it in the SALT through a Standing Consultative Commission. This Commission was established under the ABM Treaty and it applies, by incorporation the interim agreement—SALT I—to the extent that that agreement applies at all. It is my understanding that the SCC continues to be operative even though SALT I is currently "extended" by the policy statements of the two sides.

However, it does not apply or is not effectively applied if it is not part of the treaty itself. It is my own view that the Standing Consultative Commission would not be available or appropriate as such under this joint resolution for its "interim restraint regime" and, therefore, the regime would lose part of the essential and critical verification process that we associate with the SALT agreements.

So that even if you were to go ahead, arguendo, and take this joint resolution on its face, establish an interim restraint regime, insist that the President monitor and verify the compliance with that regime, whatever that is, he would not have available the opportunity of using the Standing Consultative Commission, unless we could get the Soviet Union to agree. It is my understanding from reviewing this matter with others who are experts in this field, that it may be very difficult to get the Soviet Union to agree.

In any event, we would actually have to seek that agreement from them

By way of a little redundancy, let me also agree with Mr. Richstein by suggesting that even though there is an attempt to impose a de facto treaty on the President, we are not free to do so at least in one sense. We certainly cannot enter into an agreement with the Soviet Union without their consent and, therefore, the only thing we could possibly do with a joint resolution of this kind is establish by law some unilateral obligation to do so on the President. I think we have had ample comment from the previous speaker on that matter.

Now, I want to go into another matter at greater length. It may be of some interest to comment on section 18 of the Vienna Convention. That convention was mentioned rather briefly by Senator Helms and I think he summarized the general import of the section that I referred to.

The section states, and I am quoting first the headnote: "Obligation not to defeat the object and purpose of a treaty prior to its entry into force," and then it reads in the part that is most pertinent to our interests here, "A State is obliged to refrain, from acts which would defeat the object and purpose of a treaty when it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval until it shall have made its intention clear not to become a party to the treaty."

While Senator Helms said nearly everything there is to be said about that section, I think we might add to what he has said, that section 18 is ambiguous. Last night, I went through the entire record, that is, negotiating records, what international lawyers would call the Travaux Preparatoire, and those records indicated that, although section 28 was finally voted in by the delegates to the Vienna Convention by 100 to 0, in reaching that point their various positions were positions in which they attempted to accommodate each other and so they used language that was ambiguous. When that language is applied or invoked by any of them, they are free to use it more or less to satisfy the policies that they introduced into the discussion and negotiations in the first place.

So from the point of view of section 18, I would, in the separate paper which I will be submitting, try to elaborate on those points if it is in the interest of this committee.

Thank you very much, Mr. Chairman and, again, I would like to thank you for the opportunity to appear here.

Senator EAST. Thank you, Dr. Almond. I appreciate your concise comments. They are valuable.

Mr. Kamenar?

Mr. KAMENAR. Thank you, Mr. Chairman.

My name is Paul Kamenar and I am director of litigation for the Washington Legal Foundation.

As you may know, we are a public-interest law firm that litigates matters involving constitutional issues. Particularly, we were the counsel representing 60 Members of Congress in challenging the Panama Canal Treaties on behalf of Members of the House as well as the legal counsel in the Goldwater case challenging the authority of President Carter to unilaterally terminate the Defense Treaty with Taiwan without seeking approval of the Senate or House.

I might say that Prof. Eugene Rostow served as counsel to us on briefs in the Taiwan case and we certainly appreciated his assistance.

I would like to summarize part of my testimony and I would like to at some point in my testimony indicate certain disagreement that I have with the testimony from Mr. Richstein from the Arms Control and Disarmament Agency. It is my opinion, Mr. Chairman, that after reviewing Senate Joint Resolution 212, especially paragraph 3, that it is unconstitutional in the sense that it purports to formally bind the United States to a policy of following SALT I and SALT II and is also inconsistent with section 3 of the Arms Control and Disarmament Act.

I first want to go back to basics. The Constitution provides only one modality for entering into international agreements and that is by treaty, article II, section 2, as the Senator well knows.

Indeed, this is a shared power by the President and the Senate. Indeed, even if the Senate were to approve the SALT II Treaty, the President still retains the final authority to exchange the instruments of ratification to bring it into life. Therefore, the President may not ratify the treaty even if it were approved by two-thirds of the Senate. In fact, in our history, there have been a couple of examples where a treaty was submitted, ratified, but because of the delay, things were changed and the President did not go ahead with the final ratification. This is important to keep in mind.

The House of Representatives has no constitutional role in treatymaking power, although I might add, they are trying to do it with the recent action in the last few days by Congressman Aspin.

I am aware of the rapidly growing practice of the executive branch to engage in executive agreements and I am somewhat in disagreement with the statement by Mr. Richstein that, in effect, seems to give some sort of support for this method of entering into international agreements, citing a couple of so-called precedents, including even the SALT I agreement which was submitted as an executive agreement. Indeed, the practice of executive agreement has developed to such an extent that they are even negotiated, concluded, and signed by Secretaries or Assistant Secretaries of various executive agencies, such as the Department of Commerce, the Department of the Treasury, and so forth.

The Senate's power here is being rapidly eroded and I believe it should be a purpose of this committee to correct the problem. As Prof. Raoul Berger of Harvard University stated, there is "an unambiguous constitutional requirement that treaties—meaning all international agreements and all that goes into their making—are to be the joint function of the President and the Senate."

There does not necessarily seem to be any rhyme or reason when an agreement is done by executive agreement or when it is done by treaty. We have, for example, treaties governing such obscure issues as the status of three uninhabited coral reefs in the Caribbean or regulating shrimp fishing off the coast of Brazil, but other agreements that are obviously of much more importance, such as military base agreements and even certain arms limitation agreements, have been cast in the form of executive agreements or protocol. This is a very disturbing phenomenon and one that raises serious questions.

I might want to quote from Prof. Thomas Franck and Ed Weisband and New York University Law School when they stated, "Executive officials, nowadays, cite these early precedents to conclude that long 'years of congressional practice have established the legitimacy' of this procedure." But earlier Presidents seem to have had doubts. Monroe, on the strength of a law permitting him to sell or lay up naval vessels on the Great Lakes, entered into the Rush-Bagot executive agreement of 1917 with Great Britain, limiting naval armaments on the Great Lakes. But then he began to have doubts and sent the text to the Senate for its consent:

> Such doubts are appropriate. If the drafters of the Constitution had intended to permit serious U.S. commitments to be made either by and with the advice and consent of two-thirds of the Senate or by a law passed by a simple majority of each House, why was only the first, more onerous process debated and agreed to? The answer is that the drafters wanted important international commitments made by a process requiring a higher degree of consensus than is needed to pass an ordinary law. The convention thoroughly aired a proposal, advanced by James Wilson and Gouverneur Morris, to have international commitments made by the President and a majority of both House and Senate. It was decisively rejected.

Over the years we have seen this executive agreement process grow and grow and now we have even got to the level of exchanging unilateral policies of declaration. The executive branch time and again say we need this type of mechanism in order to conduct the complex affairs of international diplomacy.

I would like to remind the committee and compare that argument to another provision of article II which requires the Senate to confirm nominees of the President that he submits here. Over the last 200 years we have had hundreds of executive officials that needed confirmation and there has never been a suggestion that there should be some other kind of method of confirming nominees.

Therefore, if the Senate has been jealous in guarding that power of article II, section 2, regarding Senate confirmation of executive nominees, they should equally and even more jealously guard the senatorial power that concurrent provision of article II, section 2, involving treaties. In that regard, I support Senator Charles Percy's view in a recent Law Review article concerning the advice and consent function of the Senate with respect to the appointment clause, when he stressed the historical purposes of our Founding Fathers in this area.

Senator Percy commended the Senate for taking its constitutional responsibility of advice and consent with increasing seriousness. He stated that although deference should be given to a President's nominee, "this does not justify congressional abdication of its responsiblity to examine these appointments." He concluded, "However, if the Senate is to participate fully in the appointment process as envisioned by the Founding Fathers, it is clear that basic reforms will be needed." I think we agree with Senator Percy on that aspect and shall equally apply his argument to the Senate ratification of executive agreements.

I would just like to discuss also this unilateral policy declaration. Unfortunately, the statement by Mr. Richstein did not clarify what the President actually said. I agree wholeheartedly with Senator Helms when he said that the President's statement on May 31, 1982, only referred to "existing strategic arms agreements." He did not refer to SALT I or SALT II. It was very general and not specific.

If you turn to page 3, however, of the testimony by Mr. Richstein, he says at the very top, "As long as our commitment not to undercut SALT is a statement of national policy," and he goes on to finish his statement. I also listened very carefully in the colloquy he had with Senator Symms when Senator Symms asked him a question. He was asked, and I think the record will show that his answer was referenced to the SALT agreements, SALT I and II, and he said that the President's statement was not to undercut those agreements. So we really do not have an unambiguous statement by the last witness as to whether or not he agrees with what the President said or whether in fact we are having a redeclaration at this hearing of what in fact the President meant by that statement.

I am also disturbed that in his statement he does not unequivocally state what arms agreements we have in existence. He was never put that question. I think that is a question you should ask: What existing agreements are there? Senator Helms correctly pointed out only one relating to the Anti-Ballistics Missile Treaty of 1972.

Finally, I would just like to point out that if you compared President Reagan's general and unspecific statement with the statement made by Secretary Vance on September 23, 1977, he clearly spelled out what was intended. Secretary Vance said, and I quote,

> In order to maintain the status quo while SALT II negotiations are being completed, the United States declares its intention not to take any action inconsistent with the provisions of the Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, which expires October 3, 1977.

So that there was a clear expression of what President Carter and Secretary Vance meant, even though by their own unilateral declaration—it does say in order to maintain the status quo while SALT II was being negotiated they would comply with SALT I. Negotiations with SALT II, however, were finished on May 11, 1979, so even by anybody's count, SALT I is a dead letter. SALT II is actually a dead letter in the sense that the Senate is not giving its advice and consent and it is highly doubtful that the President would ratify SALT II anyway.

Furthermore, Senate Joint Resolution 212, paragraph 3, qualifies the mandatory clause by saying that this is tied into the progress of the START negotiations, and I may add that the Senate and the House are powerless to invade the negotiation power of the President in this area. Sure, they may advise in treaties. Sure, they may withhold their consent. But they cannot bind the President's hands in terms of the contours upon which the START negotiations should proceed. As a matter of fact, it may even hamper those negotiations if we should bind their hands in that respect.

Thank you very much, Mr. Chairman.

Senator EAST. Mr. Kamenar, thank you very much.

Professor Rees.

Mr. REES. Mr. Chairman, I would like to address briefly the precedents that were cited by Mr. Richstein and discussed by the witnesses here today in which executive agreements have been used as substitutes for treaties.

There are, it is true, hundreds of cases in which an executive agreement with congressional approval has been used in a situation where a treaty could also be used. It has been argued by as eminent an authority as Prof. Louis Henkin of Columbia Law School that a joint resolution passed by simple majorities of both Houses and signed by the President is a complete substitute for the treaty; that this is an alternative method under the Constitution for accomplishing what could be accomplished by a treaty.

When the precedents are examined, however, at least the early precedents overwhelmingly involved trade conventions and postal conventions. These were agreements pursuant to an express grant of constitutional power to Congress, the power to regulate trade with foreign nations or to establish post offices.

Second, they were almost always situations in which some appropriation was going to be necessary.

Third, they frequently concerned matters in which it was thought that the President would have had the power to act alone, but for the need of an appropriation or the interference with an area in which there was a constitutional grant of power to Congress. It has long been understood that for some foreign relations matters it is not necessary to have a treaty. On such matters the President can speak for the country. Even where the President can proceed by executive agreement rather than by treaty, however, it might be necessary to implement some terms of the agreement by legislation. And so the joint resolution signed by the President was a convenient way to take care of both steps.

Now, the other area that was cited by Mr. Richstein was the admission of two States to the Union. This again is a question to which the Constitution speaks. You do not need a treaty to admit a State to the Union. You need a vote by Congress by simple majorities. The fact that those States happened previously to be nations would have no effect on the requirements of American constitutional law. If the countries wanted to become States, it was enough under the Constitution that they be admitted by simple majorities in Congress.

With the possible exception of the SALT I interim agreement, there seems never to have been a joint resolution in the foreign relations area that had the sole effect of binding the President in his

conduct of the foreign relations of the United States. In all other cases the President was asserting the right to exercise power and in some of these areas he needed appropriations from Congress or he felt it was politically desirable to have the approval of Congress, so he proceeded by joint resolution rather than by executive agreement.

Again, with the exception of SALT I, there seems not to have been a case where Congress told the President how he was to conduct the foreign relations of the United States insofar as negotiations were concerned.

In any case, it is important to remember that if an unconstitutional thing, as the Supreme Court said in *Powell* v. *McCormack,* has been done 1 time or 100 times, it does not thereby become constitutional to do it again. This is the distinguishing characteristic of written constitutions.

There has never been, to my knowledge, a court case testing the validity of a congressional resolution signed by the President that sought to bind the President, in negotiations, that sought to take away the President's ability to change course when he deemed it in the best interests of the Nation, that sought to bind all future Presidents as this resolution would do.

Of course, one of the reasons there has never been a court case is because of judicial resistance to tread into the area of separation of powers. But this puts an even greater responsibility on Congress to consider the constitutionality of what is being done, of resolutions that it is considering, and neither the fact that it has been done 100 times before nor the fact that the courts are not likely to intervene can make it constitutional if the Constitution forbids it.

An examination of the constitutional scheme, the written Constitution as designed by the framers, suggests that joint resolutions passed by simple majorities were not intended to be all-purpose alternatives to treaties. Consider what the framers of the Constitution meant when they required the advice and consent of two-thirds of the Senate in order to ratify a treaty. One might conclude, as Professor Henkin and others conclude, that it was simply an alternative; that it might have been undesirable in foreign relations to go through the cumbersome procedure of enacting a law, with all the possibilities for obstruction and delay in the House and Senate. So the treaty power might have been just a way to enact foreign-affairs legislation with the concurrence of only one House of Congress.

I do not think that is the most obvious interpretation. If the framers were trying to make treaties easy to ratify, they need not have required a two-thirds majority of the Senate. Whenever supermajorities are required, the intention is usually to preserve a minority veto. The intention is to make it harder to do something, not easier. Indeed, commentaries going back to Madison and Jay have spoken of the President and the Senate together as virtually a fourth branch of Government when it comes to conducting foreign relations. Madison spoke in Federalist 42 of the peculiar need of the United States to speak with one voice when it speaks to foreign nations. Usually, that is the voice of the President but when it comes to committing the United States to agreements with foreign nations, something else is needed.

It is important to remember that the States were giving up powers when we went from the regime of the Articles of Confederation to the regime of the Constitution. Something was needed to compensate the States for the powers they were giving up. The Constitutional Convention debates reflect an awareness that the Senate was the body that was peculiarly representative of the States and only indirectly representative of the people as a whole, the whole country. Letting some power reside in the Senate and letting the treaty power reside in the Senate and the President collectively was the formula that was struck in order to balance those interests.

As has been pointed out, the convention rejected the normal legislative balance of simple majorities in both Houses plus the signature of the President or, alternatively, two-thirds of each House without the signature of the President. That was not the formula they chose.

The whole history, in sum, of article II, section 2, indicates that it was not an alternative method to make it easier to get us into entangling alliances but a restriction to make it more difficult.

For simple majorities of both Houses to pass what seems properly to be the subject matter of a treaty amounts, therefore, to little more than usurpation of the constitutional functions of one branch by another. There is some overlap, of course; there are some things that could be dealt with by treaties and could be dealt with by laws. But this proposal stretches that concept of concurrent jurisdiction beyond the limits of its logic.

This resolution adopts by reference the terms of a treaty that has failed. Whether it has failed formally or just actually does not affect what this resolution is about.

The treaty could not get two-thirds of the Senate when it was proposed to the Senate. The country has since elected a President who campaigned against the treaty, who was attacked by the incumbent President for being against the treaty. For a joint resolution explicity to refer to the terms of that treaty, a treaty that has been blocked, certainly tests the limits of the logic that these are alternative methods and that sometimes a joint resolution will suffice to accomplish a result that should seem otherwise to be done by a treaty.

Now, I would like to stress that in order to accept the idea that the treaty power is an exclusive power, one need not believe in a broad inherent constitutional power for the Executive. Indeed, I personally believe that the Congress might be able to do much of what is attempted to be done in Senate Joint Resolution 212 if they did it explicitly as a limitation on the spending power, as apparently Representative Aspin is trying to do. That is, if Congress wants to forbid the President to build certain missiles, then he can be denied the money to build those missiles. I believe that is a constitutional exercise of the congressional spending power. What Congress cannot do is to tell him how he is going to negotiate with the Soviet Union. Even if they phrased such instructions as a limit on the spending power, there would be profound constitutional problems. Could Congress, for instance, say that the defense appropriation is contingent on the President firing or retaining the incumbent Secretary of State? I submit that this would be an unconstitu-

tional condition on the spending power. It would not really be an exercise of the spending power at all.

When you examine closely what this resolution is trying to do, it is trying to do much more than tell the President that he cannot build a particular missile. Indeed, the committee report is very vague as to whether certain missile programs would or would not undercut the SALT treaties.

The committee report is a very interesting document. It says on page 8, for instance,

> The committee has not attempted to define or elaborate in detail all the hypothetical acts by either side which could arguably undercut the SALT agreements. The committee believes that the President should have considerable flexibility and discretion in making such judgments, relying upon the best evidence of the intelligence community and the advice of his administration and including consultations with this committee and other appropriate committees of Congress.

It goes on to say that the President should deal with the Standing Consultative Commission and that the commission would be expected to have close consultations with the committee on such matters.

The committee report also states that this resolution will have the full force and effect of law; that the committee and the Congress in full can be expected to exercise full oversight to insure compliance with the letter and spirit of the resolution. What is attempted is to tie the hands of the President in his negotiations

What if the President decides that the Standing Consultative Commission does not happen to be the best way to negotiate with the Soviets in the event that they violate the SALT treaties? The "shall" language in this resolution and the express language of the committee report indicate that the President's hands are intended to be tied. Even if this were an explicit use of the spending power, which it is not, I think that would be unconstitutional.

I would also like to draw attention to the fact that in section 3 of the resolution, where it says that the United States "should" raise questions of possible inconsistencies related to the restraint regime through the Standing Consultative Commission, that the language looks advisory but may in fact be mandatory. The phrase is in a paragraph that begins, "The United States shall continue to restrain." The whole paragraph tries to tell the President how he must negotiate. And the committee report seems to suggest that if the President wishes to derogate from the procedures set forth in the resolution, he should check with the Foreign Relations Committee and they will grant or deny permission. One need not believe in broad inherent executive authority to believe that this is not the way it was supposed to be.

Finally, I would like to suggest that if Congress had the power to limit the President in the way this resolution attempts to do, it would nevertheless be at least anticonstitutional, if not unconstitutional, to do it in a resolution that looks like this one. This resolution comes in the clothing of a Fourth of July speech, commending the President for being such a wonderful fellow and for exercising such restraint. It does not purport, except with one word in the resolution and then with a couple of paragraphs buried in the committee report, to have any legal effect.

I happened to notice on the front page of the Wall Street Journal yesterday an article about the Racketeering Act, the RICO Act, which everyone thought was to control the Mafia. Now we are going to use it to control stockbrokers. They interviewed a professor at the University of Notre Dame who was involved in writing the original act, and he said, yes, that is what we wanted when we wrote it, to get stock brokers as well as racketeers.

But I doubt whether most of the Senators and Representatives who voted for that were thinking about stockbrokers. They were thinking about the Mafia. The name of the act was chosen, no doubt, to help them think about the Mafia while they cast their votes.

In this case, I think the reason for the attempt to enact this substantive limitation on the powers of the President in a resolution that purports to be a Fourth of July speech is that whoever wrote it does not think it could get the votes if it said, "The President will not build the following missiles." So even if you have got the power, I think a conscientious legislator has to consider what is really going on in the resolution, and if you want to limit the President, if you want to tell him that he cannot build the missiles, pass a bill that says so openly; or explicitly deny that power in the appropriations process. Do not pretend to be commending when you are in fact restricting.

Thank you, Mr. Chairman.

Senator EAST. Thank you, Professor Rees.

I wish to thank you all for taking the time to give us your valuable commentary and expertise.

There are several generalizations I would like to make about what you gentlemen have said.

First, I think the language in section 3 that says, "We shall continue," indicating a clear obligation to do so, sets the parameters of Presidential obligation for the country as a whole. Referring to possible Soviet compliance, this word "should," is used, suggesting no real obligation. Not only that, the euphemism, "inconsistencies," is used rather than the word "violations." The President should raise this issue in another appropriate channel. I know, as sure as you and I sit here and talk about the matter, that if Senate Joint Resolution 212 was passed by the Congress and the President was obligated to comply with it—in short, to honor SALT I by this de facto ratification and if it was clear that the Soviet Union was violating the treaty—there would be enormous political pressures from certain quarters in this country not to do anything about it. This, of course, would be confrontational in tone, attitude, and approach, as well as disruptive of good international dialog.

The world assumes mysterious shapes here in Washington. This is a classic example of it: An attempt through the most clandestine slight of hand, to obligate us to a treaty that clearly could not pass muster today. The President would not submit it. The Senate would not pass it.

I think this part 3, then, is very clearly wrong. As a matter of craftsmanship and draftsmanship, not to mention its policy implications, Senate Joint Resolution 212 is appalling. Your recognition of the clever slight of hand in the change of wording from "shall" to "should" brings to light the true import of this legislation. I

would agee with your final point that we are critically concerned about the treatymaking process because formally it refers to SALT I and II and SALT II presently before the Senate Foreign Relations Committee. That is the controlling point and the Senate must be responsive to it.

We seem to be in agreement that this resolution is dangerous, because it is simply trying by indirection to make that treaty operative without Presidential approval and without the two-thirds approval of the Senate. The resolution in effect provides the treaty to be operative by a simple majority vote in the House and the Senate.

But you go beyond that and I think properly so, raising the larger questions of executive-legislative relations in the area of American foreign policy. What, for example, is the role of Congress as regards executive privilege? That is a whole other area of inquiry.

I believe the issues are important, but our preoccupation should be with the treatymaking process since it is a treaty that is the main point of reference in Senate Joint Resolution 212, and it is a treaty that is before the Senate.

I would think that those who support executive agreements as well as those who think they are clearly unconstitutional would certainly be able to agree that is the Presidential prerogative, the obligation under the Constitution to initiate foreign agreements, determine the milieu for them, and set their parameters. Certainly that is true under treaties, and I see no reason why it is not equally true of executive agreements.

Clearly the resolution does great violence to the concept of separation of powers because it presupposes that the Congress may set the climate and be the initiator. The language of the resolution stating that, "whereas President Reagan has declared the United States will continue to refrain from actions" misrepresents the President's position. He did not refer by name to the SALT agreements. We have been through that. His direct quote is instead, "existing agreements." This resolution is a public attempt to suggest the executive has initiated this resolution.

It simply will not wash. The resolution is patently offensive to our basic understanding of executive initiative in the treatymaking process. We keep coming back to this common denominator—executive initiative and prerogative. It is fundamental. It is a fundamental ingredient of the treatymaking power. I would suppose that the executive branch and the White House would be deeply concerned about the implications in Senate Joint Resolution 212 which would debilitate their treatymaking power.

Under Senate Joint Resolution 212, the U.S. Senate, along with the House of Representatives, would be the new initiators of foreign agreements. This would greatly limit the President's freedom to negotiate, thereby undermining the constitutional right of the executive in the area of foreign affairs. As both you, Professor, and Mr. Kamenar rightly noted. The initiative belongs exclusively to the executive's.

I agree with you, Professor Rees, that Congress has the right to influence arms or foreign policy agreements. But that is a different

proposition from Senate Joint Resolution 212, which assumes that Congress may initiate a treaty.

I did not mean to repeat what you gentlemen have been saying, but I thought it was important to emphasize these points.

Lest I appear to be an imposing host, I will cease and desist. I would welcome any final observations you may wish to share with the committee.

Yes; Mr. Almond?

Mr. ALMOND. Mr. Chairman, I normally would not venture into this but it occurred to me, one of the things we might do with this resolution is offer a suggestion, particularly since we are outsiders to the process. We can make a suggestion as to what might be done in paragraph 3 in place of the language that is presently there, and I have thought this one over with considerable care and I offer it as a suggestion. It can be used as a suggestion in part just to examine how far paragraph 3 is going or where our own objectives lie and that might read as follows: For insuring progress in the START and related arms control negotiations, the United States and the Soviet Union should adopt measures that will lead to an effective and lasting reduction and limitation in armaments; that the measures adopted assure the security of each and both of them through fully verifiable measures and that both sides act consistent with the avoiding, deterring, and preventing of the outbreak of war and the use of nuclear weapons in their relations with each other and with other states throughout the world.

The purpose of this, again, and I stress this is merely to get a focus on what perhaps we are looking for here rather than what was said in 3—I leave it on that basis alone.

Senator EAST. Thank you, Dr. Almond.

Mr. KAMENAR. I would just like to make reference to one point concerning unilateral policy declarations, that there have been cases in the past that the International Court of Justice has ruled on, that in some cases, statements by an executive of a country can have some binding effect. This was the case in France in 1974, when their Minister announced unilaterally that they would cease atmospheric testing and it was a challenge by Australia and the International Court of Justice has ruled that statements like that can have binding international effects even though I would object to that in terms of domestic law. There have even been some suggestions that President Reagan's statements, however, it is being twisted in terms of what he said, could have some binding effects on the United States. I would just like to point out, under the Case Act, any written or, and I might emphasize this, oral agreements by the executive branch has to be submitted to the Congress within 60 days. That 60 days runs out midnight tonight. So I do not think you will see a statement coming from the State Department that here we have another agreement. It is an area that the Senate should watch out for because unilateral statements is a further diminution of the Senate's powers, besides an already questionable use of executive agreement power.

Senator EAST. Thank you.

Professor Rees?

Mr. REES. First of all, I would like to observe that a clever lawyer could argue perhaps that the statement by the representa-

tive of the State Department this morning might be the required submission of the oral agreement. I would argue strongly against that interpretation but, as Senator Symms pointed out, sometimes you need to have a lot of advanced legal training to think things that you should not think.

The second observation I have is that you have emphasized several times, Senator, that it is important that the SALT treaties are still before the Senate. That is a two-edged sword. Because, as a matter of international law, it has long been thought—and I think the Vienna Convention restates this—that there is an obligation on the part of the Nation considering a treaty not to do anything to undercut it while it is pending. Well, the question that has to arise at this intersection of international law and the constitutional law of the American political system is whether President Carter abused the treaty power by holding the treaty and not allowing it to come to a vote at a time when it would have been defeated. If in fact this gives rise to an international obligation on our part not to do anything to undercut the treaty, then a conflict arises between international law and constitutional law. It is clear that as a matter of American constitutional law we do not have any obligation to honor an unratified treaty. In some cases we may be obligated by the Constitution even to do things that might be in violation of customary international law.

Finally, you pointed out that the executive ought to be concerned about this infringement on the executive power. This observation tells part of the story behind the gradual acquiescence in joint congressional agreements in cases where treaties would otherwise seem to be required.

If it is perceived as an infringement only on the executive power and the executive is going along, then it seems harmless and nobody cares. But, of course, that is not true, because some structural damage always results from unconstitutional acts. There is a constitutional difference between President Reagan's making a statement about his present intention with regard to the Soviet Union and this formal declaration. The committee report says the resolution will "formalize" the statement. But what is desired is to make it the law, to make it binding on the President as more than a statement of his present intentions. The executive has the power at the moment to change his mind and this resolution would purport to take that power away from him. Even if the executive does not show any present concern about this resolution, I think it is the responsibility of the Congress to show concern for the constitutional prerogatives of the executive. Nor is it just the executive prerogative that is threatened. It is the prerogative of that fourth branch of the Government, the President and the Senate, that is being questioned here. Therefore, even if the President were willing to endorse this resolution tomorrow, I do not think that would make it any more constitutional or make it a matter of less grave concern for the Senate.

Senator EAST. Am I correct that the United States is not a signatory to the Vienna Convention, to which you alluded?

Mr. REES. Not of the SALT Treaty. But it is pending consideration, I believe. Perhaps Mr. Almond would be able to fill this in. But my reference was to customary international law. While a

nation is thinking about becoming a signatory to a treaty, certain obligations attach.

Senator EAST. By using the language "pending negotiations" could we not by slight of hand, become obligated in domestic and international law to do something that would be at odds with the treatymaking process? That would seem to be an untenable position to take from the U.S. Constitution which is the operative document, the controlling document.

It seems to me the treatymaking power is in effect vitiated by that line of metaphysics. By entering into some sort of pending arrangement, you thereby never actually consummate the contract. You simply, by the very fact of entering into a discussion, now become obligated to honor the contract.

Second, as Dr. Almond suggested, I think a simple resolution might be an alternative and would certainly be in order. It can be the sense of the Senate, if they want to do it—although I would not support it—that the President ought to indicate his approval of SALT II and that the U.S. Senate ought to begin proceedings to concur in his ratification of the SALT II Treaty. I think that is what these good gents want. They regret that Carter withdrew the treaty, that Reagan does not support it, and that we are not considering it.

A resolution of that sense, that the Senate ought to act upon SALT II and to make it operative, would be fair game. But a resolution that would seem to make it not just a sense of the Senate or of the Congress, but to make it a rule of law, that in effect we are bound by the SALT I and SALT II agreements based upon some vague comment that the President made out in the hinterlands, does violence to any fair and objective reading of the U.S. Constitution.

Mr. Almond, did you want to make a final point on this aspect of the Vienna Convention that I raise?

Mr. ALMOND. Well, Mr. Chairman, I will try to elaborate on this in the prepared paper which I have for you. I think, in all fairness, the position of the U.S. Government through the Department of State is that though we have not ratified the Vienna Convention on the law of treaties, we have determined that many of the provisions are what in international law is called Customary International Law; that is, they only set forth in writing what was the existing law. The problem with that approach, with the Vienna Convention for a nation like ours, is it is a very general approach and it has certain limitations when we get down to sensitive matters such as a SALT or any other matter of that nature, and to suggest that, after a period of time, after the signing and some indefinite time before ratification, we are still subject to the restraints or undertakings as set forth in that commitment creates ambiguities.

I, on the other hand, will attempt to elaborate on this from just strictly a legal point of view.

Senator EAST. Thank you, gentlemen. I thank you all again for coming.

[The prepared statements and submissions of Messrs. Almond and Kamenar follow:]

PREPARED STATEMENT OF HARRY H. ALMOND, JR.

INTRODUCTION

The primary issues in Section 3 of S. J. Res. 212, which is the focus of this Statement, are associated with the doctrine that evolved in the United States Supreme Court known as the doctrine of the "political question." A number of cases and numerous articles related to this doctrine. An early work, JUDICIAL ASPECTS OF FOREIGN RELATIONS, by Louis L. Jaffe, Harvard University Press: Cambridge, Mass., 1933 is an excellent analysis of the difficulties that a court - and accordingly an international lawyer - would have if the issues were submitted for "resolution."

The purpose of my Statment is to bring out the difficulties associated with that question, and to indicate where confusion and ambiguity arise, the interaction of the international and internal law and policy that make the matter exceedingly complex, and to provide some clarification of matters that remain ambiguous in the S.J. Res. 212 itself. As the political question doctrine makes clear, it is up to the branches of government to assure each other that their participation is justified, but also essential for sound management of foreign affairs, and the cases indicate that there are some standards from past practice that make this primarily an executive matter.

Some confusion may arise as to the designation usually based upon the expectation that the legislature is the law - <u>making</u> branch and the executive the law - <u>applying</u> branch.

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However, our constitutional practices have long ago indicated that this is not the appropriate way of perceiving the issue: law making occurs at every level - in legislation, during the invocation and application of law, and even as part of the termination of codified law - in international fields as well as internal. On these matters see Arie David, THE STRATEGY OF TREATY TERMINATION, Yale University Press, New Haven and London, 1975, and R. Kearney and R. Dalton, "The Treaty on Treaties," 64 American Journal of International Law. 495 (1970). In Baker v. Carr, 369 U.S. 186, 1962, Mr. Justice Brennan provides a valuable introduction to the political question doctrine, and the difficulties in making determinations through court decisions concerning the process and policy oriented activities of the branches of government, in the separation of powers arena: The citation is lengthy because of its overriding significance:

> We have said that 'in determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.' Coleman v. Miller, 307 U/S. 433, 454-5. The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the 'political question' label to obscure

the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them analytical threads that make up the political question doctrine.....

(Foreign Affairs) There are sweeping statements to the effect that all questions touching for foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis

of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.....

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identifies it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The Supreme Court - and our constitutional practices - in the past have favored wide discretion and an open range for judgment in the President in foreign affairs, in order that he might expeditiously develop our security. These actions have the protections afforded the people through the participation of Congress, the budgetary appropriation authority, and so on. But it may be too easily overlooked that the pressures for exercising power and influence by the United States are very great, because it is great power, and curbing its executive in this exercise will, ultimately, mean the loss of those powers and the credibility of other states that we can exercise it.*

*This theme is pursued in a variety of sources. THE FEDERALIST PAPERS, the leading text, POWER AND SOCIETY, by Harold Lasswell and Abraham Kaplan, Yale University Press, New Haven, 1950, Klaus Knorr POWER AND WEALTH, New York, 1973; in Alexis de Tocqueville, DEMOCRACY IN AMERICA, see esp., Vol. 1 (Bradley edition, Alfred A. Knopf, New York, 1945) at pp. 234-5, with the familiar passage - "But a democracy can only with great difficulty regulate the details of an important undertaking, persevere in a fixed design, and owrk out its execution in psite of serious obstacles. It cannot combine its measures with secrecy or await their consequences with patience..."

I

I appreciate an opportunity to present my views as an international lawyer with respect to S.J. Res. 212. The expectations of the Committee on Foreign Relations set forth in their Report with respect to that Joint Resolution into nuclear arms reductions are very substantial and deserve and I understand will have, the attention of the policy and decisionmakers of the United States Government. Part I of this statement will introduce and seek to clarify what I believe are the assumptions and expectations concerning S.J. Res. 212.

While I am a Professor teaching public international law at the National War College, I appear and provide my Statement as that of an independent witness. They are not, and do not purport to be, the positions of the United States Government or any of its agencies. They are presented to assist the Senate and the Congress in pursuing their review of S.J. Res. 212.

In this Statement I stress the international law implications. However, the United States is a great power, and its internal or domestic law - and the gradual shaping of that law and its interaction with policy in general - and with the emerging constitutional practices of the United States is of great importance both to our perspective with respect to international law and the global community and with respect to our own security. International law engages a continuous, policy-oriented effort, because we are now shaping the future global order in part through that law.

Others will testify with their own expertness concerning some of the constitutional issues and in particular the separation of powers issue that will dominate this inquiry into S.J. Res. 212. Among such others, the Committee will, unquestionably, seek out the views of those who can speak to Soviet perceptions - or misperceptions - concerning our policy (and ours with respect to theirs), to our strategic environment (which is mentioned in my Statement), and in particular to the potential effect of the Joint Resolution, if adopted, upon our negotiating policy and negotiating processes. Members of the executive branch of the government - and in particular the negotiating heads of our delegations - Ambassador Edward Rowny (head of the START negotiations) and Ambassador Paul Nitze (head of the Intermediate Nuclear Force Negotiations) - will need to be consulted.

Particular emphasis must be given the importance of the practice of the United States and of other states in the making of international law. That emphasis is important because it halps us to clarify what we are doing, internally, when we are going about making decisions and taking actions with respect to our relations with other states. This Statement draws deeply upon past practice and the evidence from that practice of the need for Presidential action, and often prompt action, with respect to matters involving our security. The SALT and other arms control agreements are agreements that involve that security.

This Statement does not advocate that the President alone is in charge of our foreign policy. The guidelines and policy provided by the Congress, and the interaction of the Congress in the process is clearly part of an adjusting

and accommodating process familiar to all members of the Congress and the Executive Branch, and providing, we believe an appropriate means for promoting the values prized by the United States. The use of resolutions in the past for those purposes was clearly stated by Mr. Justice Sutherland in United States v. Curtiss-Wright Export Corp. (299 U.S. 304, 324 (1936):

> Practically every volume of the United States statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect to subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic Affairs.

The proposed joint resolution, however, tends to be more restrictive, and seemingly appears to be part of an expectation in the Congress that closer guidance will be needed in the future with respect to arms control matters. But my Statement is primarily concerned with the ambiguities of that proposed resolution, particularly when it is applied to the current negotiations. Those ambiguities can of course be cured, but some of them arise from policy differences and would require resolution of these. As the joint resolution stands it provides, ambiguously, for Congressional participation in such matters as the negotiations themselves inconsistent with our constitutional practices of the past.

My informal testimony contains a suggestion for avoiding these ambiguities, but the Congress is free, on

constitutional grounds at least, to go farther than the Joint Resolution and to insist that it is the "sense of the Congress" that the United States put both SALT I and SALT II in force through the appropriate steps with the Soviet Union. I do not address that far-reaching policy issue, and it, clearly, is a matter for the Administration and the Congress to work out.

My statement is directed to Paragraph 3 of S.J. Res. 212. It is apparent, however, from the Report and from the Minority and Additional Views in Report No. 97-493, 97th Cong., 2d Sess., dated July 12, 1982 (herein: Report) submitted with the joint resolution that the concerns of the Committee on Foreign Relations of the United States Senate include the individual and joint concerns of a number of Senators. These extend deeply into policies that they would like the United States to adopt in the nuclear weapons negotiations.[1]

Paragraph (3) reads as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that-

(3) to provide a basis for progress during the START negotiations, the United States shall continue to refrain from actions which would undercut the SALT I and SALT II agreements, provided the Soviet Union shows equal restraint.

The United States should raise questions of possible inconsistencies related to this

interim restraint regime with the Soviet Union through the United States/Soviet Standing Consultative Commission (SCC). If the SCC is not available or appropriate then the President should raise the issue in another appropriate channel.

At this time the Joint Resolution is to be submitted to both houses of the Congress for debate on its merits. If passed, it will have the force of law. While witnesses from the executive branch, and perhaps additional independent witnesses will be presenting their positions with respect to the Joint Resolution before it is submitted to the vote, the President has an opportunity to disapprove the joint resolution, provide his reasons for disapproval, and return it to determine whether two-thirds vote can be mustered to override his disapproval.

The Office of the President must be consulted with respect to the intention or expectation of the President in referring, in a Memorial Day speech at Arlington National Cenetery, to refraining from actions inconsistent with "existing SALT agreements." If the intention was to refer to the treaties in force, it is evident that neither SALT I nor SALT II qualify, because SALT I has been extended as policy and not as a treaty by concurrent policy statements, and SALT II has not been ratified. If the intention was to refer to the ABM Treaty alone, then that should be made clear. If the intention was simply to identify the SALT agreements as those signed agreements whose negotiations have taken place with the Soviet Union

(our ratification processes aside), then it would seem that both SALT I and SALT II were implied. Because the United States in earlier positions has taken positions implying that the SALT agreements were "dead," any of the above three versions might have been meant. Until these ambiguities are clarified, the full import of S.J. Res. 212 would be difficult to establish, because it is the assumption, at least, in the last preambular paragraph of the joint resolution that the President was applying a policy to all of the SALT agreements.

In addition to these ambiguities, there are other terms in the agreements that have ambiguities that might best be overcome. The foremost issue is that of the policy of the President and what this policy is, is not clear from the statements cited in the Report. For example, it is said

> The Committee understands the Reagan Aministrations formulation of not 'undercutting' the SALT agreements as applying to actions which would contravene the agreements in a substantial and irreversible manner. While this standard would obviously not apply to every provision of the agreements, it would clearly cover a range of actions, such as the testing of existing ICBM's or SLBM's with numbers of warheads in excess of those permitted under the SALT II provisions or by the testing of more than the one new type of ICBM missile permitted. It would not, however, include the restrictions contained in the Protocol to the SALT II Treaty since the agreed term of that document has already expired.[3]

As indicated in the section cited above, the Committee has not fully identified what it means by the terms "interim restraint regime," and it has not fully clarified for itself what the Administration has adopted as its policy with respect to refraining from undercutting the "existing SALT agreements." These are matters, as mentioned earlier, that require clarification from those who are involved.

Notwithstanding these uncertainties, the majority in the Report continues:

> By setting forth the President's statement in a joint resolution, to be considered by both houses of Congress and signed by the President, the Committee intends that it will have the full force and effect of law. The Committee expects that the President will take all necessary steps to ensure that the law is observed and adhered to fully by the Departments of State and Defense and all other relevant departments and agencies. The Committee and the Congress should give rise to any private standing or cause of action to challenge the actions of the Executive branch in the courts, the Committee and the Congress as a whole can be expected to exercise full oversight responsibilities to ensure compliance with the letter and spirit of the Resolution.* The Committee expects that all members of the Executive Branch will, in good faith,

*This sentence and section in general is extremely confusing. See, however, ENDNOTE 4.

adhere to the provisions of the Resolution and will take the initiative to inform the Committee and other appropriate committees and members of Congress before taking any decision or action which might jeopardize this commitment.

The political difficulties, not addressed in this Statement, with this position seem self-evident. The Majority expect not only to introduce foreign affairs matters more extensively into the Congress, but observes that in addition to the mandate of law upon the President, private citizens will have standing and a cause of action to challenge the Executive Branch in the courts over compliance with the proposed interim restraint regime. These are indeed far reaching proposals, suggesting, at least, some of the implications of the extensive citizen participation associated with enforcing the environmental laws. While they are matters to be addressed by constitutional authorities, and by the representatives of the executive branch, it is apparent that this outcome would mean that a far wider citizen participation with respect to security, foreign affairs, arms control matters generally, and the defense matters of the nation would be entailed.[5]

Moreover, it would introduce these matters into the courts, establishing or attempting to establish jurisdiction and justiciability of issues that the Supreme Court, at least, has insisted are beyond the cognizance of the courts. Some of the observations of Mr. Justice Sutherland in United States v. Curtiss-Wright Export Corp., might be noted with respect to this proposed reach:

It is important to bear in mind that we are here

dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that, if in the maintenance of our international relations, embarrassment - perhaps serious embarrassment - is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other high officials. Secrecy in respect of information gathered by them may be highly necessary and the premature disclosure of it productive

> of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty - a refusal the wisdom of which was recognized by the House itself and has never since been doubted."[6]

For the above reasons, the proposed interim restraint regime and its expected applications remains unclear, if it is placed into force, it would lead to major shifts in the practice of the United States government in the conduct of foreign affairs. This would be particularly true if the joint resolution reaches into the conduct of negotiations by the President.[7]

Several other issues raised by the language of S.J. Res. 212 must also be mentioned. First. The development of a precedent for dealing with arms control measures through declarations of policy and intent are treated in Part II of this Statement. However, the question raised there is whether this is a desirable way of dealing with security-sensitive matters such as those embraced in the SALT talks.

Second. The policy approach would be far less easy to monitor. If the Soviet Union insisted that as policy its positions are not those that are obligatory, but those that it is following for "policy reasons," it might be less forthcoming with respect to the verification process. A breakdown in the process for adequate and sufficient verification would be inconsistent with our past practice and policies concerning the

critical element that this offers to our security under all of the arms control agreements.[8] But as the Report itself points out the full nature of the proposed regime is not clear, and, accordingly, the verification of compliance in such a regime would be less certain.[9]

The process presently pursued for ensuring compliance engages a number of features. Among them are the right of each side to use "national technical means," to insist that such measures be protected from attack or from actions that would interfere with their operation, and son on. Moreover, they have instituted the Standing Consultative Commission as a forum to hear their complaints and disagreements, and to provide advisory or recommendatory positions for the two governments. The current process draws deeply upon these measures, and also upon the traditional diplomatic processes - the negotiating heads and teams, the heads of state and the foreign ministers. Without some precision with respect to the regime to be enforced, or subjected to compliance, it would be fruitless to pursue such a process. If the Soviet Union insists that the Standing Consultative Commission shall not be made available, then, of course, that major element will be withdrawn.[10]

The international law implications with respect to the proposal appear in Part II of this Statement. While the general purpose and intention of the proposed joint resolution appears to ensure that the SALT restraints will be respected, the joint resolution is not clear as to what is meant by "equal restraint," by the "interim restraint regime," by the verification procedures to be used, nor as to the actual mandate to be imposed upon the President. The separations of powers issues raised in

this connection will require closer analysis, and the full participation of the executive branch in the debates. But the proposal itself operates in a strategic environment, and that environment, based upon the deterrence in the use of weapons has, traditioanlly, required prompt action and decision, and has also, traditionally, entrusted such action and decisions to the President.[11]

ENDNOTE: Part I of my Statement has addressed the Majority views set forth in the Report with respect to S.J. Res. 212. The Minority Views of Senators Biden, Glenn, Sarbanes, Tsongas and Cranston (p. 14 ff) will be mentioned only briefly here. While the minority characterize their views throughout as a form of "direction and guidance," it strongly presses for a "restraint regime" based upon the following general principles or guidelines (p. 15):

> First, Congress should recognize the value of a bilateral, mutual and verifiable freeze on the testing, production and deployment of nuclear warheads, missiles and other delivery systems. This would prevent developments which might frustrate my attempt to achieve substantial reductions and bring the arms race under control.
>
> Second, Congress should take a strong position that, as a minimum, the provisions of the Strategic Arms Limitation Talks (SALT) ii should be followed by both sides as closely as possible. We may not wish to initiate a new SALT ratification effort, but we do want to ensure the tightest possible application of the restraints to which the Soviet Union has agreed.
>
> Third, the Administration must be prepared to carry out its belated commitment to substantial reductions.

The language of the Minority Report is stronger than appears to be language that is limited to "direction" and "guidance," and is insistent that a nuclear freeze be adopted without first ensuring that the Soviet Union cut back its armaments that it is believed have led to an imbalance in the balancing equilibrium of strategic nuclear weapons. It is not clear from the Minority Report however whether the freeze would extend to testing, or to research and development, or activities associated with "modernization." It is also not clear that if these are to be included how verification is to take place. Senators Pell and Dodd declare their intention (at p. 27) to support the nuclear freeze and to press for it in the debates of the full Senate.

Senator Helms, in Additional Views, pp. 28-82 argues against the SALT agreements as "fatally flawed," and claims that verification has fallen short of our security needs under the agreements. Much of his position turns on this and upon Soviet violations, summed up on page 29:

> The record of the Soviets in violating their agreements is well known, and has been documented by competent authorities. It is only because of special political reasons and ideological unreason that this country has not made its case to the world on Soviet violations. Thus the case for a 'freeze' - or even START - has to overcome formidable obstacles to be absolutely verifiable. Without such assurance, endorsing either concept would be an irretrievable step.

1. This theme of growing Congressional concern is pursued in David M. Abshire and Ralph D. Nurnberger, Editors, The Growing Power of Congress, Sage Publications, Beverly Hills and London (Published for the Center for Strategic and International Studies, Georgetown University) Washington, D.C., 1981. Even in the area traditionally associated with the constitutionally authorized powers of the President to act as commander in chief, and with respect to his powers to make executive agreements under this authority (Article II, Section 2 of the United States Constitution), the Congress has succeeded in establishing closer participation Section 2 of the War Powers Resolution (P.L. 93-148, 93rd Cong., H.J. Res. 542, November 7, 1973) reads in its lead-in:

> Sec. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.....

The interaction of the powers of the President and the Congress in foreign affairs is such that establishing clear-cut lines with respect to the separation of powers is no easy matter. See generally, Louis L. Jaffe, Judicial Aspects of Foreign Relations, Harvard University Press, Cambridge, Mass., 1933. At p. 9 he states: "In the process of articulating the powers of government, there is on one hand the task of distributing these powers, and on the other the problem of coordinating their exercise." See also Thomas M. Franck and Edward Weisband, Foreign Policy by Congress, Oxford University Press: New York and Oxford, 1979, and the materials and sources cited therein.

2. Senator Helms, in his "Additional Views" in the Report argues that neither SALT I nor SALT II are in force, because SALT I has expired by its own terms, and SALT II was never ratified. He notes: "...the Administration has said that SALT II is dead. There is, therefore, no agreement." (at p. 30 in the Report).

3. Report, p. 7.

4. Report, p. 10. The Report, however, on this subject is bewildering. While stating at p. 10 that private causes of actions would be recognized the same Report, at p. 8 states exactly the opposite (stressed below):

> Beyond these general assumptions (as to what the Majority believe is the expected coverage of the proposed interim restraint regime), the Committee has not attempted to define or elaborate

> in detail all the hypothetical acts by either side which could arguably undercut the SALT agreements. The Committee believes that the President should have considerable flexibility and discretion in making such judgments, relying upon the best evidence of the intelligence community and the advice of his Administration, and including consultations with this Committee and other appropriate committees of Congress. The President can and should take all relevant circumstances into account, including the degree of restraint demonstrated by the Soviet Union in its force deployments and the strategic force requirements of the United States. It is the intention of the Committee that the Resolution should not give rise to any private standing or cause of action to challenge the actions of the Executive Branch in the courts.

The page 8 statements, cited above, indicate that the understandings or commitments with respect to the interim restraint regime are only "general assumptions," that there are actions which may arise as it is developed that will be permitted and others that are not to be permitted, that the Committee believes that the President should have "considerable flexibility" in making these judgments - but implying that such judgments may also be reviewed by the Committee, and that consultation with the Congress is expected. I do not believe that the Committee contemplates a unilateral regime. I believe a shared regime of policy is expected. For a general review of moving in this direction, though not directed to the SALT, see Louis Henkin, Foreign Affairs and the Constitution, The Foundation Press, Inc., Mineola, New York, 1972, pp. 89-123. Henkin cites the appropriate authorities.

5. Mention might be made here that in requiring "compliance with the letter and spirit of the Resolution," the joint resolution will extend its application beyond the requirements imposed by a literal reading of the Vienna Convention on the Law of Treaties (i.e., Article 18 in particular, which is reviewed in Part II of this Statement).

6. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). The Court in this case cited language to the same effect as that quoted above from the Senate Committee on Foreign Relations, February 15, 1816 (U.S. Senate Reports, Committee on Foreign Relations, Vol. 8, p. 24). And it cited President Washington for the reasons provided the House of Representatives when he denied access to the negotiations concerning the Jay Treaty. Washington's statement concluded: "To admit, the, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiations with a foreign power would be to establish a dangerous precedent." Vol. 1 Messages and Papers of the

Presidents, p. 194. (Citations used here as given by Mr. Justice Sutherland). See also Chicago and Southern Airlines v. Waterman Steamship Corp., 333 U.S. 103.111 (1948): "executive decisions in foreign policy....long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

7. The representatives of the Executive Branch will unquestionably be addressing the issue whether the Joint Resolution is regulating the negotiations in the SALT talks, by establishing the SALT agreements as a base for those talks. If it is claimed that the SALT talks differ in appraoch and content from the SALT agreements, then insistence on the continuation of the SALT agreement restraints might be said to affect the President's freedom to negotiate. That would probably be inconsistent with the past practice with respect to separation of powers. See also ACDA Statute, Section 34. (Negotiation mandated to Director, ACDA under direction of Secretary of State). That, of course, is a political question.

8. Section 37 of the ACDA Statute, added by Section 4 of P.L. 95-108 sets forth extensive requirements with respect to verification, and reporting on all aspects of verification with respect to all arms control agreements on a continuing basis. The tenor of the Section is clear from the lead-in language:

> Sec. 37(a). It is the sense of the Congress that adequate verification of compliance should be an indispensable part of any international arms control agreement. In recognition of such policy and in order to assure that arms control proposals made or accepted by the United States can be adequately verified by the Director shall report to the Congress, on a timely basis,.....

9. Verification requires access to the relevant data with respect to compliance with arms control agreements, like the SALT, undertakings to refrain from concealment or interference with securing access to such data, opportunities to maintain a continuous monitoring activity with respect to compliance, and the assessments of the data received. These, currently, are protected in the SALT I and SALT II instruments through appropriate clauses. However, increasingly, the two sides have found it necessary to manage their disagreements over the data and over access to data in the Standing Consultative Commission. But verification, in any event, is a function of what is to be verified, because the two sides each depend upon their own "national technical means" and this limits each of them to what can be verified by those means. On this matter, as presented here,

see the essays in William C. Potter, editor, Verification and SALT: The Challenge of Strategic Deception, Westview Press, Boulder, Colorado, 1980. Further discussions on the subject are found in the appropriate documents published by the Arms Control and Disarmament Agency. Additional materials and articles are cited in Potter.

10. The standing Consultative Commission is presently operating with respect to SALT I, so that this is not likely. But it is only possible to speculate about the expectations of the Soviet Union with respect to compliance as proposed for this interim restraint regime. They may simply find that the proposed regime of S.J. Res. 212 has no security value for them. The Commission and its competence are established in Article XIII of the ABM Treaty and the language used regarding its operation commences with the words: "For the purposes of this Treaty..." It was incorporated by reference in the Interim Agreement (SALT I), and in SALT II. The Report, page 8, believes that the Standing Consultative Commission will be available and recognizes its importance:

> ...questions or concerns which may arise regarding specific Soviet actions which could be construed by the United States as undercutting the SALT agreements should continue to be raised in accordance with the procedures generally employed for that purpose under this and previous administrations. In particular, the United States should make every possible use of the opportunities afforded by the Standing Consultative Commission (SCC) to discuss issues presented by the interim restraint regime. The Committee believes that the availability and use of the SCC has been a significant factor in the continued maintenance of SALT I restraints during the five years since the expiration of the Interim Agreement. As the Resolution states, additional diplomatic channels should be employed if the SCC is not available or appropriate for this purpose. The Committee would expect to have close consultations with the Administration on such matters.

Under this perception, the Committee is proposing that the United States establish its interim restraint regime with the Soviet Union, that it uses the Standing Consultative Commission to ensure compliance with the regime - though its precise obligatory dimension is not clear, and that the President with respect to the matter engage in close consultations. The Committee also states that the duration of the proposed regime is not established, but "undoubtedly" will "depend on the length of time required to negotiate" the new START agreement. Others will have to assess whether the proposal would establish new and untried or undesirable procedures and precedents with respect to verification of these arms control agreements,

through a shift from the treaty provisions to the uncertainties of the interim restraint required.

11. Deterrence is an instrument used in our foreign policy, and is associated with the influence process that characterizes foreign relations. The action element of deterrence is clear from the analysis of Y. Harkabi, Nuclear War and Nuclear Peace, Israel Program for Scientific Translations, Jerusalem, 1966, p. 9 et seq. "Deterrence is the inducement of another party to refrain from a certain action by means of a threat that this action will lead the threatener to inflict retaliation or punishment...Deterrence is not limited solely to enemies, but is also a means of influencing the conduct of friends. A person may be deterred from performing an action not only by the fear of punishment and injury, but also by the fear of losing an expected advantage or gain. This is deterrence through 'denial of reward.' In this way, the United States may, for example, influence her allies and nations friendly to her by hinting (threatening) that a particular type of conduct will bring about reductions in her economic or military assistance to them. In the strategic sense, however, we are dealing primarily with deterrence through threats of punishment and acts of violence." The interaction of the notions of deterrence and the use of weapons, and the distinctions, along with the development of the process of threat just noted above is explored in great detail in Alexander L. George and Richard Smoke, Deterrence in American Foreign Policy: Theory and Practice. Columbia University Press: New York and London, 1974. The balancing of power that President Nixon believed was inherent in the deterrence sought with the Soviet Union in the 1972 agreements appears in Nixon, U.S. Foreign Policy in the 1970's, 1973, USGPO. Washington, D.C., at p. 230. See also George and Smoke, op. cit., at pp. 610-613. The strategy of deterrence, or of arms control, is a strategy shared by the Soviet Union and the United States, arising from the interdependence of their decisions, according to Thomas C. Schelling, The Strategy of Conflict. Harvard University Press: Cambridge, Mass., 1960. And the misperceptions between the United States and the Soviet Union aggravate and create ambiguities in this continuously changing strategic environment. See Robert Jervis, Perception and Misperception in International Politics. Princeton University Press: Princeton, New Jersey, 1976. As indicated in the next Parts of this Statement, the legal measures - agreements, treaties and the customary international law associated with them - must be associated with the environment, and the order it compels, or they will be illusory and meaningless. The law that applies, in such environments, is that arising from the practice of states - in particular, here, that of the United States and the Soviet Union.

II

INTERNATIONAL LAW IMPLICATIONS

The primary issue raised by the Subcommittee raises questions of constitutional law and the constitutional practices of the United States. Because other experts and statements will be addressing this matter, constitutional issues will be considered only in part, and stress will be given to the international law implications with respect to the Joint Resolution. The subcommittee has requested that attention be given

> . . . whether Congress has the authority under Section 33 of the Arms Control and Disarmament Act of 1961 to lay aside the SALT II treaty, which is presently before the Senate, and revive the SALT I agreement, which expired in 1977, and obligate the United States to these agreements by means of a joint resolution.

The separation of powers issue--the primary issue raised in S. J. Res. 212--has international law implications because excessive constraints on the freedom of the President to act in foreign affairs would extend to the making, and applying, international agreements, as well as conducting foreign affairs generally. While policy in the United States rests upon popular support, our foreign policy has been entrusted very substantially to the President. The Congress, sharing in the foreign policy process, provides the broader policy guidelines, but the President is compelled to act to the changing circumstances--advancing military technologies and changing relations--among nation-States, and must have the freedom to act and react promptly and responsibly.

The international law implications in S. J. Res. 212 arise from the interaction of our own internal law with international law. Clarification of that interaction will assist in establishing the nature of the powers expected of the President under current conditions, particularly during periods in which crises overseas have become a frequent phenomenon.[1]

International law has been traditionally associated with the law of treaties--and these include SALT I and SALT II--and with customary international law. The main policy theme of the SALT and arms control agreements, however, is that of deterrence. The strategic environment associated with the deterrence that the United States and the Soviet Union share is premised on the existence of nuclear weapons. Even if these nations disarmed themselves with respect to such weapons, that disarmament would not be effective unless verification sufficient to assure that the weapons would not be developed clandestinely could be imposed. Accordingly, the strategic environment is dependent upon the balancing of the strategic nuclear weapons and upon the continued awareness, established in part through the arms control processes, that neither side can use them, or allow conflicts to escalate to their use, without endangering its own social order to irreversible and irreparable damage.[2]

Arms control policy--and the fundamental policy shared by the United States and presumably the Soviet Union of deterrence--establishes the realities upon which the arms control agreements, and leads to the legal implications associated with both these agreements and the processes by which we enter into such agreements under the Constitution. Because deterrence is that aspect of policy associated with enforcement, compliance or sanctions states that are coupled in deterrence processes seek through coercion or threats of coercion to influence each other. But for these ends they are dependent upon the use of force, and, unless other measures are available, will not refrain from the use of force, or, willingly give up their force capabilities. The legal basis for maintaining this form of order, so far, has been associated with a checks and balancing system of the

weapons involved, and with maintaining the effectiveness cf that system.

Confusion sometimes arises with respect to treaties. The practice of states under international law indicates that treaties include all international agreements, whether in writing or oral, when concluded between states.[3] The term "treaty" in United States practice is limited to the use of that term under the Constitution. However, the executive agreements, international agreements and "compacts" made by the United States that are concluded with other states are treaties, and treated as such, under international law.

According to Article VI, Clause 2 of the Constitution, treaties, when made "under the authority of the United States," are included in the "Supreme Law of the Land." And according to Article II, Section 2, Clause 2, the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." Such treaties may be ratified, accordingly, if two-thirds of a quorum of the Senate concur (Article I, Section 5, Clause 1).

While advice and consent are given by the Senate with respect to ratification, according to Corwin, the power of ratification is vested exclusively in the President:

> Although it is popularly thought that the Senate ratifies treaties, ratification also belongs to the President alone.[4]

Negotiation is also an exclusive power of the President. Mr. Justice Sutherland in a major case concerned with the power of the President in foreign affairs declared:

> Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it . . ."[5]

In addition to treaties that are ratified with the advice and consent of the Senate to ratification, United States constitutional practices recognize the making of international agreements--treaties under international law--by the President, underhis constitutional powers and authority, through delegation of authority by the Congress, and through delegation of authority indirectly by treaties. These also are the "Law of the Land," according to Mr. Justice Douglas:

> All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature . . .." The Federalist, No. 64. A treaty is a "Law of the Land" under the supremacy clause (Article VI, Clause 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity . . .."[6]

While there have been numerous contentions and

controversies over executive agreements, and their constitutionality, our most distinguished scholars have --along with the Supreme Court--fully recognized that the making of international agreements is essential, if not critical, to the management of foreign affairs, and demands that the President be free to make and conclude such agreements. There have been proposals, of course, such as the Bricker Amendment to restrict these agreement-making competences of the President, through an amendment to the Constitution, but none of the proposals have been effected.[7]

The issues associated with the Presidential competence to make treaties under his constitutional or legislative authority are issues that involve the political branches of government--the executive and legislative, and are usually matters that our courts will refuse to take jurisdiction. They are often identified as involving a "political question," beyond the competence of the Court to resolve.[8]

In addition to treaties, the United States practice embraces customary international law as part of its applicable law. Customary international law is applied in both our federal and state courts. Customary international law, however, is to be distinguished from "comity" and it is applied in our courts much as they apply common law. It is "ascertained and administered by the courts of justice of appropriate jurisdiction."[9]

With the above as background, it is possible to examine the international law implications and the interaction of international law and our domestic law in S. J. Res. 212 more closely. There are both the implications of treaty law and customary international law.

The policy elements of this interacting law become clearer as we consider more closely our expectations--and those of the Soviet Union--with respect to the SALT agreements.

Of more immediate importance, our agreements under international law, and our shaping of that law with like-minded nations whose perspectives are shared with us concerning the value-orientation in our policies associated with a global order, are in realistic terms the strategies of the nation for achieving such policy goals. We can ill afford to ignore the overriding impact of international law on the shaping of global order, and the challenge that is forced upon us and other democratic states by those whose ideologies and value-orientation sharply, and irrevocably, differ from our own.[10] While our international treaties and agreements reflect our shared policies and shared expectations such as the policies in the SALT agreements that we believe are aimed at stabilization of nuclear weapons and deterrence against their use and even prevention of nuclear warfare, there is no reason why the United States is compelled to enter into agreements where what we share is against our interests, values or policies

Article 18 of the Vienna Convention on the Law of Treaties

Article 18 of the Vienna Convention on the Law of Treaties requires close analysis, particularly with respect to its application to security-sensitive agreements such as the SALT and other arms control agreements.[11] It would be unrealistic and inappropriate in examining this Article to divorce its application and limits upon its application from this context. Article 18 reads:

Article 18. Obligation Not to Defeat the Object and Purpose of a Treaty Prior to its Entry into Force.

A State is obligated to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance, or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

While Article 18 is not legally binding upon the United States as a treaty obligation, it purportedly is part of customary international law, according to the position taken by the United States Government.[12]

The practice of states with respect to assuming obligations such as that stated in Article 18 is scarce. A version proposed by the Harvard Draft Convention on the Law of Treaties in 1935, and the comments with respect to that version indicate that the fundamental notion underlying the "obligation" is the principle of good faith:

Article 9: Obligation of a Signatory Prior to the Coming into Force of a Treaty.

Unless otherwise provided in the treaty itself, a State on behalf of which a treaty has been signed is under no duty to perform the obligations stipulated prior to the coming into force of the treaty with respect to that State; under some circumstances, however, good faith may require that pending the coming into force of the treaty the State shall, for a reasonable time after signature, refrain from

> taking action which would render performance by any party of the obligations stipulated impossible or more difficult.[13]

Because a state is under no obligation imposed by law to ratify a treaty, its commitments treated as good faith are commitments with respect to the application or interpretation of its "duties" with respect to ensuring that the treaty it may be attempting to ratify will not be substantively impaired. This means, in the simplest of terms, that it will take no action or make no decisions that are irreversibly inconsistent with the commitments it would be assuming under the treaty. With respect to the arms control agreements, a thorough policy analysis is then required, because it would be necessary to assess in the context of those agreements what would be irreversible, and what is being done or decided because of security requirements that it cannot escape.

Some have suggested, for example, that where the provisions call for weapons limitations, those provisions are not irreversibly affected if a state that has signed a treaty to limit or set the limit with respect to such weapons has exceeded this commitment. When it ratifies the treaty, it is in a position to destroy or disassemble the weapons that have been acquired in excess. But where the provision calls for a cessation of nuclear weapons testing, the policy implications may be far more complex, because it has been argued that the weapons tests are irreversible. They provide a strategic advantage to one side at the expense of the other or create an equilibrium that favors one side over the other differing from that contemplated at the conclusion of the negotiations. Of

course, even this might turn out to be a matter where the asymmetry caused is de minimis and unimportant.

However, the stress to be given here is that in making these judgments and assessments, our experience and practice have shown that these are matters for the President. The determination of the extent of our obligations under such provisions as Article 18, the perceptions with respect to our treaty-partners to be, such as the Soviet Union, our appraisal of their perceptions, and so on, are all associated with the Presidential decision-processes, and not with the deliberations associated with the making of legislation.

In the Comment to the Harvard Draft there is stress on the "reasonable time" during which the obligation of good faith extends. But determining what is "reasonable" requires the United States and the Soviet Union with respect to SALT II to assess the SALT treaties: the Protocol was limited to a termination date of December 31, 1981, which has already passed, and the main treaty extends only to 1985, and half that time has elapsed. It might also require the two sides to ascertain the nature of their checks and balancing equilibrium--to determine, with all the asymmetries that comprise the SALT package in view, whether there have been changing circumstances that would compel them to put aside some of their commitments. It clearly would require both sides to take account of their constitutional practices. The debates, proposals for reservations, interpretive statements, amendments, and policy statements developed in the treaty ratification processes in the United States have had ample precedent in earlier major treaties, and other states are well aware of these practices and their

implications. But that awareness should indicate to them the possibility that the "treaty" to which Article 18 is being applied is itself undergoing a major process of change, and will not be adopted unless those changes are reasonably accommodated. This awareness would condition their perceptions and ours concerning the obligatory element of Article 18.

According to the Comment in the Harvard Draft, even assuming that the good faith duty to refrain from improper actions is breached, that breach would only "expose the non-performing State to the charge of bad faith or may impair its good name and reputation, but it does not render such State liable to damages for violation of a legal obligation, because no legal obligation existed which could be violated."[14]

The negotiators in adopting Article 18 of the Vienna Convention on the Law of Treaties were concerned with the existing customary international law, but widely differing views were taken about this law. Unquestionably, this was the outcome of the differing perspectives they had with respect to its application and the policies underlying its adoption.[15]

However, in summary, most of the negotiators appeared to recognize that the principle being adopted was a principle of good faith. The past practice of states, largely confined to the practice evidenced in international tribunals, proved to be scarce.[16] Even the arguments with respect to good faith were not all in favor of adopting such a principle as "positive law," because the principle was identified as vague and ambiguous. Moreover, a clause that would obligate states negotiating a treaty had been considered, and was finally dropped.

Some delegates believed that a principle of good faith should appear "somewhere in the convention" and the Turkish delegate believed it should be part of the article relating to pacta sunt servanda.[17] The Japanese delegate believed that the article would be controversial "and difficult to apply."

The language adopted included some changes from "tending to defeat the object and purpose of the international agreement" to "would defeat . . ." thereby making the test a more severe standard. The terms "object and purpose" were included because the same terms were used elsewhere in the treaty (notably in Article 19 where a reservation of treaty incompatible with the "object and purpose of the treaty" is not permitted). But the meaning of these terms "object" and "purpose" were left to the subsequent practice among states to be given the greater precision required of effective law.

Other provisions in the Vienna Convention create confusion concerning the application of Article 18. Article 25, for example, provides for the "provisional application" of a treaty, so that the treaty can, by simple adoption of language, be made to apply provisionally pending entry into force. Proposals of this kind have been made with respect to the law of the sea convention, currently before states for signature or ratification.

The negotiating record of the Vienna Convention concerning Article 18 is not helpful in enabling us to determine precisely what "good faith" is expected to achieve. Remarks of delegates indicating that even if expressly introduced the principle would be "neither practical nor realistic." Or that codification of such a principle

would be inconsistent with the expectation that the Convention address "strictly legal obligations."[18]

The conclusion is compelled that the Article is not clear, does not readily appear to have been fully evidenced in the prior practice of states, and that it implies, even if it does not express, a principle of good faith that all delegates would be willing to accept as a principle rather than as unambiguous law.[19] Even if the article is to be accepted as part of the customary international law--and accordingly obligatory on states even though they have not ratified the convention--its meaning must come from the practice of states. And that practice will be the good faith actions associated with treaties that are up for ratification, yet with good faith measured against the environment in which the ratification process is taking place.[20]

Perhaps some weight should be given to the domestic or internal practices of states, like the United States, where ratification takes place of treaties only after legislative consent. The ACDA Statute, in Section 33, presumably expects that the United States will not enter into disarmament or arms control agreements unless consent to ratification is provided by the Senate, pursuant to the constitutional procedures mentioned earlier, or through the "further affirmative legislation of the Congress of the United States."[21]

Application of Article 18 of the Vienna Convention, clearly, cannot be the establishment of the law of the treaties, even if the Article must be said to have some legal effect. Only ratification of the treaty would establish the law of the treaty under the authority

of the treaty. The ACDA Statute, Section 33, appears then, as noted, to make clear only that the President, in entering into executive agreements under his constitutional authority, will not be obligating the United States until ratification or approval of the agreement establishing those obligations have been subjected to the affirmative advice and consent of the Senate or the Congress.[22]

While concluding that the President, under his constitutional authority, may enter into executive agreements, to be treated as treaties under international law, and while there are no limitations on that constitutional authority, as such, except those established through the overriding requirements usually associated with the Bill of Rights in the Constitution, Section 33 of the ACDA Statute imposes on this authority the Congressional participation through insisting on Congress advice and consent to the ratification of such agreements.[23]

However, Article 18 of the Vienna Convention, while it provides that states shall refrain from actions inconsistent with the object and purpose of treaties or international agreements that they have signed, does not provide an unambiguous directive. The United States and the Soviet Union unquestionably would expect that the directive so afforded must be determined by the circumstances of their obligations, to wit, by the nature of the agreement to which they have expected to commit themselves, and this would require further analysis than that attempted here to establish the policies and policy goals of the United States concerning SALT II.

Further clarification of the operation of Section 33 of the ACDA Statute, in the strategic environment shared by the United States and the Soviet Union of

that Section with Article 18, or the customary international law in Article 18 of the Vienna Convention, can be reached by considering the action taken by the Congress with respect to SALT I. The hearings on the SALT I Interim Agreement were extensive, with Senator Jackson identifying, in detail, and through his questions, the concerns raised by him and his colleagues over the security afforded under that Agreement. It is apparent from these Hearings and from this legislation that the Congress was not fully satisfied that the checks and balancing to be established in SALT I would be sufficient for United States security. The "object and purpose" of SALT I, at least, becomes particularly cloudy under such conditions, leading to a need for extreme caution in extending the reach of obligations of the signatories as to this security-sensitive agreement.

The legislation adopted, P. L. 92-448, approving the Interim Agreement, 30 September 1972, cited here in full, establishes authority in the President to approve his interim (executive) agreement, but also set forth the conditions and policies that the Congress was demanding with respect to the future (SALT II) negotiations. The same legislation establishes, as policy, the basis for assuring that the "supreme national interests of the United States" will not be impaired through a weakening in the survivability of the "strategic deterrent forces of the United States":

Public Law 92-448 Approving the Interim Agreement, 30 September 1972[1]

JOINT RESOLUTION

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby endorses those portions of the Declaration of Basic Principles of Mutual Relations Between the United States of America and the Union of Soviet Socialist Republics signed by President Nixon and General Secretary Brezhnev at Moscow on May 29, 1972, which relate to the dangers of military confrontation and which read as follows:

"The United States of America and the Union of Soviet Socialist Republics attach major importance to preventing the development of situations capable of causing a dangerous exacerbation of their relations . . ." and "will do their utmost to avoid military confrontations and to prevent the outbreak of nuclear war" and "will always exercise restraint in their mutual relations," and "on outstanding issues will conduct" their discussions and negotiations "in a spirit of reciprocity, mutual accommodation and mutual benefit," and

"Both sides recognize that efforts to obtain unilateral advantage at the expense of the other, directly or indirectly, are inconsistent with these objectives," and

"The prerequisites for maintaining and strengthening peaceful relations between the United States of America and the Union of Soviet Socialist Republics are the recognition of the security interests of the parties based on the principle of equality and the renunciation of the use or threat of force."

SEC. 2. The President is hereby authorized to approve on behalf of the United States the interim agreement between the United States of America and the Union of Soviet Socialist Republics on certain measures with respect to the limitation of strategic offensive arms, and the protocol related thereto, signed at Moscow on May 26, 1972, by Richard Nixon, President of the United States of America and Leonid I. Brezhnev, General Secretary of the Central Committee of the Communist Party of the Soviet Union.

CONGRESSIONAL ACTION

SEC. 3. The Government and the people of the United States ardently desire a stable international strategic balance that maintains peace and deters aggression. The Congress supports the stated policy of the United States that, were a more complete strategic offensive arms agreement not achieved within the five years of the interim agreement, and were the survivability of the strategic deterrent forces of the United States to be threatened as a result of such failure, this could jeopardize the supreme national interests of the United States; the Congress recognizes the difficulty of maintaining a stable strategic balance in a period

[1] Public Law 92-448, as amended by Senator Jackson, was approved by the House of Representatives on 25 September 1972, and by the Senate on 30 September 1972. The interim agreement on offensive arms entered into force on 3 October 1972.—Ed.

of rapidly developing technology; the Congress recognizes the principle of United States–Soviet Union equality reflected in the antiballistic missile treaty, and urges and requests the President to seek a future treaty that, inter alia, would not limit the United States to levels of intercontinental strategic forces inferior to the limits provided for the Soviet Union; and the Congress considers that the success of these agreements and the attainment of more permanent and comprehensive agreements are dependent upon the maintenance under present world conditions of a vigorous research and development and modernization program as required by a prudent strategic posture.

SEC. 4. The Congress hereby commends the President for having successfully concluded agreements with the Soviet Union limiting the production and deployment of antiballistic missiles and certain strategic offensive armaments, and it supports the announced intention of the President to seek further limits on the production and deployment of strategic armaments at future Strategic Arms Limitation Talks. At the same time, the Senate takes cognizance of the fact that agreements to limit the further escalation of the arms race are only preliminary steps, however important, toward the attainment of world stability and national security. The Congress therefore urges the President to seek at the earliest practicable moment Strategic Arms Reduction Talks (START) with the Soviet Union, the People's Republic of China, and other countries, and simultaneously to work toward reductions in conventional armaments, in order to bring about agreements for mutual decreases in the production and development of weapons of mass destruction so as to eliminate the threat of large-scale devastation and the ever-mounting costs of arms production and weapons modernization, thereby freeing world resources for constructive, peaceful use.

SEC. 5. Pursuant to paragraph six of the Declaration of Principles of Nixon and Brezhnev on May 29, 1972, which states that the United States and the Union of Soviet Socialist Republics: "will continue to make special efforts to limit strategic armaments. Whenever possible, they will conclude concrete agreements aimed at achieving these purposes"; Congress considers that the success of the interim agreement and the attainment of more permanent and comprehensive agreements are dependent upon the preservation of longstanding United States policy that neither the Soviet Union nor the United States should seek unilateral advantage by developing a first strike potential.

Prior to concluding the inquiry into this matter, however, the statements made by the United States and the Soviet Union with respect to SALT I in 1977 (after the agreement expired by its own terms) should be examined. The question raised by the Subcommittee on the Separation of Powers is concerned with whether SALT I is an "existing" agreement of the United States. While this determination would require the attention of those most closely associated with the responsibility for these decisions in the executive

branch, and particularly in the Department of State, several observations might be made with respect to the two statements. The statements themselves must be cited in full.

Statements of the United States and the Soviet Union with Respect to SALT I.

The United States and the Soviet Union made concurrent statements which - through the policy of both states - declared their intention to not take any action inconsistent with the provisions of the SALT I. The statements are not identical and in that sense are not parallel.

Statement by Secretary Vance, 23 September 1977

In order to maintain the status quo while SALT II negotiations are being completed, the United States declares its intention not to take any action inconsistent with the provisions of the Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms which expires October 3, 1977, and with the goals of these ongoing negotiations provided that the Soviet Union exercises similar restraint.

Statement of the Soviet Government, 25 September 1977.

In accordance with the readiness expressed by both sides to complete within the near future the work on a new agreement limiting strategic offensive arms and in the interests of maintaining the status quo while the talks on the new agreement are being concluded, the Soviet Union expresses its intention to keep from any actions incompatible with the provisions of the Interim Agreement on Some Measures Pertaining to the Limitation of Strategic Offensive Arms which expires

on October 3, 1977, and with the goals of the talks that are being conducted, provided that the United States of America shows the same restraint.[24]

The statements, while similar, are not identical, but the language used is close enough to find that the two states really mean the same thing. The United States declares its policy is "not to take any action inconsistent with the provisions of the Interim Agreement" or with the "goals" of the SALT II negotiations as long as the Soviet Union exercises similar restraint. The Soviet statement of policy "expresses its intention to keep from any actions incompatible with the provisions of the Interim Agreement" and with "the goals of the talks (SALT II Talks) that are being conducted. Both of them raise ambiguities concerning the duration of the policy - as stated, and assuming that the policy in each might terminate according to its own terms, because both refer to maintaining the status quo only while the negotiations on SALT II are taking place. However, in their practice, both states have continued to observe, and have taken no steps to terminate, the policies they have enunciated.

Accordingly, it seems that the United States government in these matters is most likely going to take the position that the 1977 policy statements - though imposing no legal obligations as such, or at least those obligations dependent upon full satisfaction of our constitutional practices - remain effective as policy

declarations and have not been terminated. If this position is indeed taken, part of Paragraph 3 of S. J. Res. 212 is unnecessary, except that that joint resolution would mandate the United States to continue this policy-established regime by law. However, as mentioned earlier, the mandate and the mandating language in S. J. Res. 212 are ambiguous, and it could mean that the expectation was to put the burden on the United States government to maintain a policy, declared by the executive branch, under law, and to maintain that policy as law.

END NOTES

[1]Numerous writers in the past have explored the need for prompt executive action in the face of crisis, or critical change. Among these may be cited Adam Smith, WEALTH OF NATIONS ("The first duty of the sovereign (is) that of protecting society from the violence and invasion of other independent societies . . .."); Nicolo Machiavelli, THE DISCOURSES, and Alexander Hamilton in the FEDERALIST PAPERS. See generally, Edward Mead Earle, "Adam Smith, Alexander Hamilton, Friedrich List: The Economic Foundations of Military Power," at p. 118ff, in Earle, ed., MAKERS OF MODERN STRATEGY, Princeton University Press, Princeton, 1949.

[2]Alexander L. George and Richard Smoke, DETERRENCE IN AMERICAN FOREIGN POLICY: THEORY AND PRACTICE, Columbia University Press: New York & London, 1974, state views widely accepted. Deterrence they state "is simply the persuasion of one's opponent that the costs and/or risks of a given course of action he might take outweigh its benefits." (p. 14) It depends accordingly upon the exchange of threats, the capabilities to use force, and the will to use it. Furthermore, "Deterrence is a policy which, if it succeeds, can only frustrate an opponent who aspires to changing the international status quo in his favor. The consequences of continued frustration, however, are not easily predictable and are not necessarily benign. The most reliable benefit successful deterrence can offer is more time--time in which some of the conflict-

generating or conflict-exacerbating elements in a historical situation can abate, so that deterrence will no longer be necessary or, at any rate, so critical for the maintenance of peace . . .. Another possibility . . . is that deterrence gives the opposing parties time to work out an accommodation of their conflicting interests, thereby reducing tensions and the potential for overt conflict in their relationship. But time is a precious commodity, and the failure or inability of the parties concerned to make use of it to reach an accommodation can easily transfer deterrence into a more permanent way of life." (p. 5)

[3]The Vienna Convention on the Law of Treaties concluded May 23, 1969, has not been ratified by the United States. However, its definition of the term "treaty" represents a broad consensus, with respect to treaties in written form. Article 2, Para. 1(a) states: "(a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Whiteman, DIGEST OF INTERNATIONAL LAW, Vol. 14, Washington, September 1970, contains a note at p.5: "Although there is no rule of international law requiring that a treaty be in writing, an oral treaty is a rarity. The necessity for a clear and lasting record of an agreement virtually dictates that a treaty be in writing."

[4]Edward S. Corwin, THE CONSTITUTION AND WHAT IT MEANS TODAY, Revised by Harold W. Chase and Craig R. Ducat, 14th Edition, Princeton University Press, Princeton, New Jersey, p. 168. See ibid, generally,p. 168 et seq. Cf. to same effect, Professor Myres S. McDougal and Associates: "As we have pointed out there is a popular misapprehension that the Senate ratifies treaties. Actually the Senate's role is limited to the giving of consent; the President can refuse to ratify a treaty to which the Senate has consented. There are approximately fifty instances where this has taken place." Myres S. McDougal and Associates, STUDIES IN WORLD PUBLIC ORDER, New Haven and London, Yale University Press, 1960, p. 577, Footnote #63. For the practice of the United States, generally, see Whiteman, op. cit., p. 61 et seq.: The President may refuse to ratify a treaty even when advice and consent has been given.

[5]United States v Curtiss-Wright Export Corporation et al., 299 U.S. 304, 319 (1936). The State Department Procedures on Treaties and other International Agreements, Circular 175, October 25, 1974, 11 FAM 700, declare in Paragraph 721.4 that consultation will take place with the Congress to determine whether the agreement to be used in foreign affairs is an executive agreement or treaty. This

determination may in a practical sense have its effects on the negotiations.

[6]United States v. Pink, 315 U.S. 203 (1942); see also, United States v. Belmont, 301 U.S. 324, 331 (1937). Wide ranging problems relate to whether a treaty is self-executing or non-self-executing. While there is no general rule with respect to this matter, the guideline often adopted is whether the treaty needs to be implemented by legislation because of its effect on private rights. For a general discussion, see Louis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION, The Foundation Press, Mineola, New York, 1972, p. 156ff.

[7]Materials and documentation with respect to the Bricker Amendment can be found in Myres S. McDougal and W. Michael Reisman, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY, Mineola, New York: The Foundation Press, 1981, pp. 1174-5. Myres S. McDougal and Asher Lans in a series of articles, collected in McDougal and Associates, STUDIES IN WORLD PUBLIC ORDER, New Haven and London: Yale University Press, 1960, pp. 404-762, inclusive, consider the matter of executive agreements and treaties in United States practice. They state at p. 411-412: "In addition to the treaty-making procedure, which may - as the nation has found from bitter experience - be subjected to minority control, there is what may be called an 'agreement-making procedure,' which may operate either under the combined powers of the Congress and the President or in some instances under the powers of the President alone. The practices of successive administrations, supported by the Congress and by numerous court decisions, have for all practical purposes made the congressional-executive agreement authorized or sanctioned by both houses of Congress interchangeable with the agreements ratified under the treaty clause by two-thirds of the Senate. The same decisive authorities have likewise made agreements negotiated by the President, on his own responsibility and within the scope of his own constitutional powers, appropriate instruments for handling many important aspects of our foreign relations." The two authors describe the executive agreement and the treaty requiring advice and consent as "interchangeable procedures" afforded under the Constitution. (at p. 412)

[8]See Baker v. Carr, 369 U.S. 186, 217 (1962), ibid., at pp. 211-212, for a recent discussion of the "political question," its application as a doctrine by the Supreme Court, and for references to earlier cases. The RESTATEMENT OF THE LAW: FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED), Tentative Draft No. 1, American Law Institute, Philadelphia, 1980, contains a review of cases and materials on the "political question," at pages 3-6. The broader issue is discussed at length in Thomas M. Franck and Edward Weisband, FOREIGN POLICY BY CONGRESS,

New York and Oxford, Oxford University Press, 1979. The War Powers Resolution is a recent example of the struggle between the branches of government with respect to foreign affairs. The Joint Resolution on War Powers is P. L. 93-148; 87 Stat. 555, 50 U.S.C., 1541-1548, passed over President's veto November 7, 1973.

[9]On "comity" see Hilton v. Guyot, 159 U.S. 113, 163-4 (1895). The application of international law in the courts is described in The Paquette Habana; the Lola, 175 U.S. 677, 700 (1900). Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) identifying the "act of state" doctrine as a doctrine under international law, noted that the international law applicable in United States was applied as the "federal common law." The same position was taken in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793).

[10]This subject is considered in depth in Harry H. Almond, Jr., in "The Struggle for a World Legal Order: An Overview of an Adversary Process," 61 Marquette Law Review 1 (1977).

[11]Vienna Convention on the Law of Treaties has not been ratified by the United States. Convention, done at Vienna, May 22, 1969. Reprinted in 8 I.L.M. 679 (1969).

[12]While the Convention has not been ratified by the United States, in its Letter of Submittal to the President, the Department of State said that "although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st Sess. (1971), p. 1. From p. 71, RESTATEMENT OF THE LAW, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED), Tentative Draft No. 1, April 1, 1980, Philadelphia, Penna.

[13]The Harvard Draft Convention on the Law of Treaties appears in RESEARCH IN INTERNATIONAL LAW, III, 29 Amer. Journ. of International Law 655, Supplement, 1935 (Washington, D.C.). Article 8 of the Draft declares that "The signature of a treaty on behalf of a State does not create for that State an obligation to ratify the treaty." The Harvard Draft, among other things, identified the Convention on Treaties, Adopted by the Sixth International Conference of American States at Havana, February 20, 1928, as evidence of state practice. Article 5 of the Convention (set forth at p. 1205 of Vol. 29 A.J.I.L.) declares: "Treaties are obligatory only after ratification by the contracting States, even though this condition is not stipulated in the full powers of the negotiators or does not appear in the treaty itself." Article 7 of the Havana Convention declares: "Refusal to ratify or the formulation of a reservation are

acts inherent in national sovereignty and as such constitute the exercise of a right which violates no international stipulation or good form. In case of refusal it shall be communicated to the other contracting parties." The Draft of the International Commission of American Jurists, Rio de Janeiro, 1927, at p. 1223 in the same volume, and also cited by the Harvard Draft committee, declares, in Article 7: "A refusal to ratify is a right of States and can not be considered an unfriendly act. The refusal shall be communicated to the other contracting parties."

[14]Harvard Draft, op. cit., at p. 781, the RESTATEMENT, April 1, 1980, op. cit., in Sec. 314, p. 110ff, applies the standard that defeating the "object and purpose" would be measured by whether the action is "irreversible." Mention is made there concerning the probable irreversible element in weapons testing where tests are to be banned. The principle of good faith as discussed in this Statement has its counterpart in the so-called fundamental norm of pacta sunt servanda. The expectation associated with the norm is that states will, in good faith, take a liberal and constructive view toward assuming the commitments under treaties. But even this norm, and its expectations, must be assessed against the extent to which there is community or a community of interests against which it can be applied. The element of good faith in relations during periods of hostility and confrontation cannot be expected to be of the same quality as that expected during periods of friendly and peaceful relations. On this matter, see generally, the Harvard Draft, Article 20, p. 977ff. It must be stressed that pacta sunt servanda is applied to treaties in force, but the expectations associated with treaties may be measured by perceptions similar to those for treaties merely signed: "In determining whether in a particular case a State is guilty of lack of good faith in the performance of a stipulation, it may be necessary to take into account a variety of circumstances . . .. One thing is clear; namely, that the utility of the treaty system depends in large measure upon the degree of good faith with which States fulfill the engagements which they have undertaken." (p. 981) But this only turns us back to reviewing their expectations and perceptions.

[15]The negotiating record (travaux préparatoires) appears in the OFFICIAL RECORDS - UNITED NATIONS CONFERENCE ON LAW OF TREATIES, First and Second Sessions, Vienna, 26 March - 24 May 1968 and 9 April - 22 May 1969. The records include summary records of the plenary meetings and of the meetings of the Committee of the Whole and the Documents of the Conference. These materials will be identified in subsequent footnotes as "Vienna Conference." Recourse to a negotiating record is traditional in international law among some states, but not among others. The Federal Republic of Germany does not follow such a procedure,

Article 32 of the Vienna Convention, however, permits the use of "supplementary means of interpretation," and such use is also implied in Article 31, the General Rule of Interpretation.

[16]The Austrian delegate (Zemanek) could identify only three cases: Igancio Torres v. The United States, Megalidis v. Turkey, and the Case Concerning Certain German Interests in Polish Upper Silesia. Upon examination none of these is particularly helpful. The Polish Upper Silesia Case (P.C.I.J. (1926) Series A, #7) is most often cited, but the case merely touches upon obligations of states signatory to a treaty as dicta, and is not particularly helpful. See VIENNA CONFERENCE, Meetings of the Committee of the Whole, 19th Meeting, 9 April 1968, pp. 100-101.

[17]VIENNA CONFERENCE, op. cit., p. 100.

[18]See remarks of Iranian delegate and the delegate from the Federal Republic of Germany, op. cit., p. 100.

[19]See, however, Ukrainian Delegate who believed the Article "had a perfectly sound basis in positive law." At one stage the United Kingdom delegate sought deletion of the entire Article, and the French delegate observed that "the most obvious way for a State to make clear its intention not to become a party to the treaty was for it to frustrate the object of the treaty." VIENNA CONFERENCE, op. cit., p. 100. Uncertainties among the delegates abound in the record.

[20]The Harvard Draft, op. cit., at p. 779 notes that the States to the Berlin Act of July 26, 1885, in Article 38 had agreed to a provision which forbade the signatories from taking action in contravention of the provisions of the treaty prior to their ratification. I cannot here determine whether such a procedure would be acceptable to the United States if adopted, or would contravene the separation of powers. The Draft, at p. 786, also notes that in Article 19 of the treaty signed at Washington, February 6, 1922, on Limitation of Naval Armaments, it was agreed that:

> The United States, the British Empire and Japan agree that the status quo at the time of signing of the present treaty, with regard to fortifications and naval bases, shall be maintained in their respective territories and possessions specified hereunder. The maintenance of the status quo under the foregoing provisions implies that no new fortification or naval bases

> shall be established in the territories and possessions specified; that no measures shall be taken to increase the existing naval facilities for the repair and maintenance of naval forces, and that no increase shall be made in the coast defenses of the territories and possessions above specified.

Other treaties with express provisions have been cited, but these must be distinguished from the implied obligation of Article 18. Moreover, the Washington Naval Treaty has been construed to mean only that the obligation was to ensure that the status quo expected at the time of signing would not be impaired by conduct between signature and ratification - not that the conduct specified would be prohibited absolutely.

[21]See Section 33 of the ACDA Statute. For an extended analysis of the President acting under policies formulated by the Congress and therefore as an "agent of the Congress," see the thorough review by Professor Myres S. McDougal and Asher Lans, p. 492 et seq., in STUDIES IN WORLD PUBLIC ORDER, op. cit. The entire review on President powers with respect to executive agreements appears in this text on pages 404-717.

[22]The Bricker Amendment to the Constitution mentioned later in this note was an attempt to change this constitutional authority of the President with respect to international agreements that he might make under his wide constitutional powers. The Case Act requires the President to communicate to Congress the texts of all executive agreements. (See P. L. 94-403 (S. 596), 86 Stat. 619 approved August 22, 1972. The Case Act includes "oral international agreements," but they "shall be reduced to writing." The "Commitments Resolution" expressing the sense of the Senate that national commitments involving the use of armed forces abroad or promises to assist foreign states by use of the armed forces or the financial resources of the United States were limited to those established by treaty or pursuant to act of Congress (under the resolution). See 115 Cong. Rec. 3603, 17245 (1969). The Morgan-Zablocki Bill, H. R. 4438, 94th Cong., 1st Sess., 1976, would have required the President to transmit to Congress any agreements involving a "national commitment which could only enter into force after a 60-day waiting period during which Congress could disapprove it. See RESTATEMENT OF THE LAW, Tentative Draft No. 1, April 1, 1980, op. cit., at p. 102, where the above is set forth. The Morgan-Zablocki Bill was part of the debates leading to the War Powers Resolution. See, generally, on this

proposal for a Congressional veto. The Bricker Amendment appeared in many versions. According to William W. Bishop, Jr., INTERNATIONAL LAW, 2d ed., Little, Brown and Company, Boston and Toronto, 1962, at p. 104, among the most discussed proposals was the text reported by the Senate Judiciary Committee on June 15, 1953, as follows:

> 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.
> 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.
> 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.

For further discussion, see Bishop, op. cit., pp. 104-105. Bishop indicates that the House never voted on any of these proposals for amending the Constitution and "interest apparently declined gradually." (See Article V of the Constitution: two-thirds vote of both Houses to propose amendments to the Constitution.

[23]The legislative history with respect to Section 33 of the Arms Control and Disarmament Act of 1961, and in particular, the requirement that the President seek approval for his arms control agreements, appears in The Congressional Record, September 19, 1961, pp. 20308-20309, 87th Cong., 1st Sess. (Vol. 107, Part 15), where Congressman Fountain is identified as the author of the provision. The fact that a Congressional veto is intended is brought out in the following passage:

> This amendment is designed to insure that on the subject of arms control no President of the United States, whoever he may be, will ever take any action that is not in conformity with the Constitution of the United States. No matter how meritorious any arms reduction proposal of the future may be, and regardless of what the rest of the world may be willing to agree to, the President cannot under this amendment commit America to it, except pursuant to the treatymaking power under the Constitution, or by affirmative legislation by both the House and the Senate. It forbids a President acting on his own. This is no reflection upon our present great President. It is a source of protection to him and to those who succeed him and to the security of the United States.

It seems clear that Congressman Fountain did not intend to impose Congressional controls on the negotiating competence of the President, nor to take away his power to ratify, through legislation. He has, in short, identified the affirmative legislation as the equivalent of the requirements imposed and the participation established for the Senate in the treaty-making "power." This is in effect a Congressional veto, but cannot constitute Congressional power to insist that a treaty or international agreement be adopted.

[24]United States Statement in Department of State Bulletin, 7 November 1977, pp. 642-3; Soviet Union statement in Soviet Embassy Information Department statement, 26 September 1977.

ENDNOTE. Further review with respect to the matters of this section should be pursued in the Print, CONGRESSIONAL REVIEW OF INTERNATIONAL AGREEMENTS, Hearings before the Subcommittee on International Security and Scientific Affairs of the Committee on International Relations, House of Representatives, 94th Cong. 2d Sess, July, 1976. See in particular the statements of Professors Moore and McDougal. Other pertinent material include Committee Print, of the same Committee, AUTHORITY TO ORDER THE USE OF NUCLEAR WEAPONS, 94th Cong., 1st Sess, December 1, 1975 and the HEARINGS on NUCLEAR WEAPONS AND FOREIGN POLICY, of the Subcommittee on U.S. Security Agreements and Commitments Abroad and the Subcommittee on Arms Control, International Law and Organization of the Committee on Foreign Relations, United States Senate, 93rd Congress, 2d Sess., on U.S. Nuclear Weapons in Europe, and U.S.-USSR Strategic Doctrines and Policies, March and April 1974, Washington, 1974. A recent study is James L. Sundquist, THE DECLINE AND RESURGENCE OF CONGRESS, Brookings Institute, Washington, D.C. 1981

A summary of the treaty-making power, appearing in Edward S. Corwin, THE CONSTITUTION AND WHAT IT MEANS TODAY (Revised by Harold W. Chase and Craig R. Ducat, (1978 Edition), Princeton University Press, pp 168-9 states:

The Treaty-Making Power

¶2. Clause 1. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur;

It is usual to regard the process of treaty-making as falling into two parts, negotiation and ratification, and to assign the former to the President exclusively and the latter exclusively to the Senate. In fact, it will be observed, the Constitution makes no such division of the subject, but the President and the Senate are associated throughout the entire process of "making" treaties. Originally, indeed, Washington tried to take counsel with the Senate even regarding the negotiation of treaties, but he early abandoned this method of procedure as unsatisfactory.[57] Thus what was intended to be *one* authority consisting of two closely collaborating organs became split into *two*, usually rival and often antagonistic, authorities, performing sharply differentiated functions. In consequence, in 1816, the Senate created the Committee on Foreign Relations as a standing committee, and through this medium most Presidents have managed to keep more or less in touch with Senatorial sentiment regarding pending negotiations, but not always with the result of conciliating it.[58] Today the actual initiation and negotiation of treaties is, by the vast weight of both practice and opinion the President's alone.[59]

Although it is popularly thought that the Senate ratifies treaties ratification also belongs to the President alone. But he may not ratify a treaty with the result of *making* it, unless the Senate by a two-thirds vote of the members present, there being at least a quorum, advises such ratification and consents to it.[60] And since

[55] 1977 *Cong. Quart. Weekly Report* 817 and Jack Calhoun, "Vietnam Pardon, Stage II," *The Nation*, May 14, 1977, p. 594.

[56] *New York Times*, Aug. 26, 1976.

[57] Corwin, *The President, Office and Powers*, 255-257.

[58] Edward S. Corwin, *The Constitution and World Organization* (Princeton, 1944), ch. III.

[59] United States *v.* Curtiss-Wright Corp., 299 U.S. 304, 319 (1936).

[60] The statement that consent of the Senate must be given by a two-thirds vote of a *quorum of the Senate* has apparently not always been true. Senator H. Alexander

the Senate may or may not consent, it may consent conditionally, stating its conditions in the form of amendments to the proposed treaty or of reservations to the proposed act of ratification, the difference between the two being, that whereas amendments, if accepted by the President and the other party or parties to the treaty, change it for all parties, reservations merely limit the obligations of the United States thereunder. Amendments are accordingly resorted to in the case of bilateral treaties, and reservations in the case of general international treaties, like the Hague Conventions or the United Nations Charter.

Of course, if the President is dissatisfied with the conditions laid down by the Senate to ratification he may refuse to proceed further with the matter, as may also the other party or parties to the proposed treaty.[61] With well over 1000 treaties submitted by Presidents to the Senate from 1789 through 1971, it is a good calculation that the Senate amended about 14 per cent, and rejected or so tampered with about 12 per cent that either the President or the other contracting party declined to go on with them.[62]

The Scope of the Power

The power to make treaties is bestowed upon the United States in general terms and extends to all proper subjects of negotiation between nations. It should be noted, however, that a treaty to which the United States is party is not only an international compact but also "law of the land," in which latter respect it may not override the higher law of the Constitution. Therefore, it may not change the character of the government which is established by the Constitution nor require an organ of that government to relinquish its constitutional powers.[63]

Smith of New Jersey, a member of the Foreign Relations Committee, wrote to Edward S. Corwin August 14, 1957, as follows: "Replying to your letter of August 11th with regard to the making of treaties—a few years ago we were very lax in this matter and treaties were frequently ratified by voice vote. We adopted the rule then, however, that there must be a full quorum present, and two-thirds of the Senators present must concur. This means two-thirds of a quorum, of course. Under the present practice we have a quorum call first, and then a roll call vote, with the vote announced and a statement from the chair that two-thirds of a quorum being present and having voted, etc., the treaty is agreed to."

[61] "Obviously the treaty must contain the whole contract between the parties, and the power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President, acting for the United States, and the commissioners of the other contracting power. The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratifications conditional upon the adoption of amendments to the treaty." Fourteen Diamond Rings *v.* U.S., 183 U.S. 176, 183 (1901).

[62] Charles H. McLaughlin, "The Scope of the Treaty Power," 43 *Minnesota Law Review*, 651, 659-678 (1959). McLaughlin's figures were updated by information provided to the editors by the Department of State. For the tabulation, *see* 13th edition of this work, p. 131.

[63] *See* e.g., Geofroy *v.* Riggs, 133 U.S. 258, 267 (1890); Doe *v.* Braden, 16 How. 635, 657 (1853); The Cherokee Tobacco, 11 Wall. 616, 620-621 (1870); United States *v.* Minn., 270 U.S. 181, 207-208 (1926).

III-1

CONCLUSIONS.

The responses to the request of the Subcommittee can now be summarized. This request is (a) whether Congress has authority - i.e., constitutional authority - under Section 33 of the Arms Control and Disarmament Act of 1961 to lay aside the SALT II treaty and (b) revive the SALT I agreement, and (c) obligate the United States to these agreements by means of a joint resolution.

The questions raised by the Subcommittee extend to the concurrent yet differing powers of the President and the Congress with respect to our foreign affairs powers. As indicated in the body of my Statement, these are matters that must have further policy assessment and judgments by those who are responsible for such judgments, and while it also requires the assessment of independent constitutional law scholars, the observations made here will be those of the independent witness, and are not to be attributed to the United States government or its agencies. [1]

The democracy of constitutional review involved in assessing S. J. Res. 212 may be assessed also against the observations of Eugene Rostow, currently Director, the Arms Control and Disarmament Agency:

> The American constitution is an evolving pattern of usage governing the exercise of public authority. The written Constitution which went into effect in 1789, and its amendments are an integral part of the living constitution. But they are by no means all of it. And in the interpretation of this written Constitution - as in the development of the unwritten one - political and social experience, history, custom and memory play a role, far more important than the syntactic analysis of sacred words. [2]

My own perspectives, and the conclusions and questions that follow, stem from the view that the United States in pursuing decision and action in foreign affairs, and in accommodating the participation shared primarily between the Congress and the President, must be such as to ensure that our values are preserved and protected, while attention is given commensurate with the crisis or threatening crisis of any kind by a President freely enabled to act. [3]

The Report of the Majority on Nuclear Arms Reductions (Report No. 97-493, 9th Cong. 2d Sess., Senate, July 12, 1982) declared that it was "the purpose of the

joint resolution" to "express the Congress's full support for the President's recent initiatives on the Strategic Arms Reduction Talks (START) and to formalize an interim policy on mutual SALT restraint that will contribute to stability and continuity while the United States pursues the far-reaching reductions in nuclear weapons it seeks in START."

Moreover, the Joint Resolution, in Paragraph 3 sought to formalize the "restraint" associated with SALT I and SALT II, drawing upon the President's statement on Memorial Day (1982) at Arlington National Cemetery. In this sense, the Joint Resolution attempts, by law, to impose obligations similar to - intended to be identical to - those implied in Article 18 of the Vienna Convention on the law of Treaties. But in mandating the President it provided by law for Presidential action what, traditionally, and under our constitutional practices had been within the policy freedoms of the President. To this end, the Joint Resolution might appropriately be modified, so that its policy will declare what action the President "should" pursue and not what he "shall." The possibilities for an undesirable precedent, in the current version, and a shift from the past constitutional practices of the two branches of the government seem fairly evident.

A part of the ambiguity appears in the uncertainty associated with the Joint Resolution with respect to reviving the SALT agreements. If the Congress is seeking to establish

as a policy guide the "sense of the Congress" that the President should seek ratification and revival of the two agreements that should be made clear. But if the intention, is to direct the President in the negotiation and making of foreign policy, the Joint Resolution would create a precedent incompatible with our existing constitutional practices.

However, because it is my view that Section 33 of the ACDA Statute does not authorize Congressional action beyond a Congressional veto relating to the ratification of international treaties and agreements, the position taken by the Report, cited immediately below, is unclear. The President's "options" in negotiation are those that develop while he is pursuing the negotiations, and his negotiating "options" are not affected and can not be affected by a Joint Resolution as such. Moreover, the use of parallel policy statements as a mandated "option" would - under past practice - require great care and caution particularly in pursuing a deterrence regime associated with arms control over strategic nuclear weapons.[4]

The Report at p.9 states:

> It may be that additional steps can and should be taken to strengthen the interim restraint regime contemplated by this Resolution. The Committee believes, for example, that mutual confidence would be considerably enhanced by an authoriative Soviet declaration

> paralleling President Reagan's Memorial Day pledge, and recommends that the President encourage the Soviets to issue such a statement. It may be possible for the President to conclude a limited, interim agreement which simply incorporated his formulation, it is the intention of the Committee that this Resolution should provide the affirmative legislative authority contemplated in Section 33 of the Arms Control and Disarmament Act. (citation to Section 33 proviso omitted). In this regard, enactment of this joint resolution increases the President's options in dealing with the Soviet Union. (stress added to the statement.).

A shift to policy statements as the means to establish and maintain relations with any state, let alone the Soviet Union, with respect to matters as complex and interdependent as those involved in the major arms control negotiations would be a shift also toward the adoption of declarations, generally, as part of the arms control process. This, I believe, would be inconsistent with past policy, and also inconsistent with the requirements of Section 33 of the ACDA Statute in the portion preceding the proviso. I do not believe that Section 33 authorizes the Congress to disarm the United States by measures other than treaties or Congressionally approved executive agreements, pursuant to constitutional practices.[5]

With these personal observations, in view, it is possible to turn to the questions raised by the Subcommittee:

-As to the first - the issue whether the Congress has authority under Section 33 of the ACDA Statute to lay aside the SALT II treaty from the cognizance of the Senate - and the matters raised require the attention of authorities on our constitutional law. As indicated in my Statement, it is my view that Section 33 provides only a Congressional veto applicable in the ratification process, and no more, and does not, and cannot affect the negotiating powers of the President, nor his exclusive authority to ratify treaties and "approve" international agreements.

-As to the second - the issue whether the Congress has authority to revive SALT I - it is my view that the Congress cannot, by its own action, or by imposing its mandate upon the President, establish an international treaty or international agreement with the Soviet Union as to SALT I. The consent of that nation is required to establish treaty relations with the United States, and SALT I has expired by its own terms. But according to the Report, the intention was to provide "options" for the President, including the establishment of an "interim restraint regime" through parallel declarations of the two states. This would be a new practice for arms control matters, and I have indicated some of the disadvantages that would be involved.[6]

-As to whether the Congress can obligate the United States to the two SALT agreements by Joint Resolution, it appears that the Majority position in the Report was to fall short of this. But if such an intention could be established, it would be an attempt to establish treaty relations with the Soviet Union - a matter that could not be done without the President pursuing that goal, and would require Soviet consent pursuant to its treaty-making authority, powers and procedures.

Among the questions raised, but not fully answered in this Statement are the following:

-What is the full effect of the law that is established by the Joint Resolution? What about verification, which is not mentioned? (SEE ENDNOTE). Aside from the legislative history appearing in the Report on the Joint Resolution, is it intended to create relations similar to those established by treaties - in mandating "an interim restraint regime?" What is the meaning to the term "equal restraint," and how is that term to be applied when it comes to seeking compliance or observance of the "regime?"

-How does the Joint Resolution perceived by our policy-makers? What weight will be given, for example, to the policy makers in the Department of State, Department of Defense, Central Intelligence Agency, National Security Council and the White House? What weight to the ambassadors in charge of the negotiations and to their perceptions - to

the views of Ambassadors Edward Rowny and Paul Nitze?

-Even if the matter relating to the separation of powers is fully resolved, but a joint resolution of this kind is adopted, what will be the effect on the Soviet Union? Or upon the people of the United States? Or upon Europeans and their governments?

These of course are questions beyond the competence of the international lawyer.

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August 3, 1982

*The views in this statement and the arguments and proposals made are entirely those of the author, and not to be attributed to the United States Government, nor to its agencies, or officials. They have been submitted with the expectation that they may serve the Senate in its deliberations and debate over S. J. Res. 212.

ENDNOTES.

1. The matter presented has similarities to the larger question involved in the Steel Seizure Case (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 1952. The concurring opinion of Mr. Justice Jackson indicated that the Presidential powers under the Constitution, in general, might be assessed in terms of authority as to whether his decisions are support by Congressional legislation, or where measures are taken that are inconsistent or incompatible with the expressed or implied will of Congress, or under his independent, or constitutional, powers. As to the last, Justice Jackson believed there was a "zone of twilight where he and Congress may have concurrent authority."

While these observations of Mr. Justice Jackson are helpful as general guidelines, however, it is probable that the Court would continue to stress the dominance of the President in the negotiating and the making of international agreement including treaties, following the opinion, earlier cited, of Mr. Justice Sutherland in the Curtiss Wright Case (299 U.S. 304, 1936). The difficulties in statutory interpretation for example are revealed in such cases as Schwegmann Bros v. Calvert Distillers Corp., 341 U.S. 384 (1952). See, generally, Henry M. Hart, Jr. and Albert M. Sacks, THE LEGAL PROCESS, Cambridge, Mass., 1958. However, because we are concerned with treaties and accordingly, with the policies of two or more states, our perspectives must accommodate this level of interpretation and rely upon the clear showing of the expectations of the states. According to Myres S. McDougal, Harold D. Lasswell and James C. Miller, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE. New Haven and London. Yale University Press, 1967, at pp. xvi-xvii: "The primary aim of a process interpretation by an authorized and controlling community decision-maker can be formulated in the following proposition: discover the shared expectations that the parties to the relevant communication succeeded in creating in each other. It would be an act of distortion on behalf of one party against another to ascertain and to give effect to his version of a supposed agreement if investigation shows that the expectations of this party were not matched by the expectations of the other. And it would be an obvious travesty on interpretation for a community decision-maker to disregard arbitrary assumptions of his own." I have attempted to follow these precepts in this Statement, and to apply them, in particular, to the appraisal of Article 18 of the Vienna Convention on the Law of Treaties.

2. Eugene Rostow, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT A D THE QUEST FOR LAW, 1962, p.xix. Cf., to same effect, Myres S. McDougal, THE APPLICATION OF CONSTITUTIVE PRESCRIPTIONS: AN ADDENDUM TO JUSTICE CARDOZO, Vol. 33 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, Number 5/6, May/June 1978, p. 255 et seq. Professor Quincy Wright, cited in Louis L. Jaffe, JUDICIAL ASPECTS OF FOREIGN RELATIONS (IN PARTICULAR OF THE RECOGNITION OF FOREIGN POWERS), (Harvard University Press), Cambridge, Mass. 1933, at p. 10 declared that our constitutional practices, the practice of the United States under its constitution, and with respect to powers that, under all circumstances, could only be defined ambiguously, the practices themselves must lead to their own resolution of differences:

> The constitutional understandings are based on the distinction between the possession of a power and discretion in the exercise of that power. The law of the constitution decides what organs of the government possess the power to perform acts of international significance (inter alia), but the understandings of the constitution decide how the discretion or judgment, implied from the possession of power, ought to be exercised in given circumstances.

Jaffe notes that this indicates that "attempts to buttress desirable constitutional understandings by "legal" compulsions deduced from the Constitution have not succeeded." (at p.10).

3. Reid v. Covert, 354 U.S. 1, 1956 introduces the participation of the judicial branch into foreign affairs as well, because the Court there, with the precedent of Geofroy v. Riggs, 133 U.S. 258, declared that "This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty." (The Case concerned the preservation of the rights to trial by jury for civilian persons accused of crimes). On the participation by the judicial branch, see, generally, Jaffe, op. cit.

4. The policy or "political" as well as the strategic elements involved in the subject-matter associated with the Joint Resolution have been most recently considered by a number of experienced individuals. These appear in the controversies over the proposals for renouncing the first-use of nuclear weapons, appearing in McGeorge Bundy, George F. Kennan, Robert S. McNamara and Gerard Smith, "Nuclear Weapons and the Atlantic Alliance," published simultaneously in Europa-Achiv., No. 7, 1982, and in FOREIGN AFFAIRS, Spring 1982, pp. 753-768, and in the response made by Karl

Kaiser, Georg Leber, Alois Mertes and Franz-Josef Schulze, "Nuclear Weapons and the Preservation of Peace," in FOREIGN AFFAIRS, Summer, 1982, pp. 1157-1170. The initial proposal turned on phasing out nuclear weapons while phasing in conventional weapons to provide the checks and balancing and deterrence processes with the Soviet Union. While the German authorities see the "urgent need" to reduce dependence on the first use of nuclear weapons, they would not renounce first use through a declaratory policy. Their concluding remarks are:

> "In sum, we consider efforts to raise the nuclear threshold by a strengthening of conventional options to be urgently necessary. The reduction of the dependence on first use, in particular on early first use of nuclear weapons, should be a question of high political priority in our countries.
>
> The Western Alliance has committed itself to a renunciation from the very beginning: the renunciation of the first use of any force. The entire military planning, structure and deployment of forces are geared exclusively toward defense. The presence of nuclear weapons has contributed essentially to the success of the Alliance in preventing war and preserving freedom for three decades. We are convinced that a reduction of the dependence on early use of nuclear weapons would serve this purpose. Under the circumstances of the foreseeable future, however, a renunciation of the option of first use would be contrary to the security interests of Europe and the entire Alliance." (at p. 1170).

5. The question might be raised, but is not answered in my statement, whether the Congress can condition or limit in any way the President's constitutional powers to make and conclude executive agreements. If this action is unconstitutional, assuming that the distinctions between what are those constitutional powers, and the establishment that they are exclusive powers in the President are satisfied, then Section 33 of the ACDA Statute might be construed as unconstitutional. This however is a question for expert opinion on constitutional law. However, if testing of Section 33's constitutionality were to occur, it would be need to be a question that could avoid the constitutionality-avoidance rules set forth by Mr. Justice Brandeis in his concurring opinion in Ashwander v. TVA, 297 U.S. 288, 346-348 (1938).

6. The position taken in my Statement is at variance with the import of the Report with respect to "undercutting" international treaties and agreements. Refraining from actions which would "defeat the object and purpose" of an agreement that has been signed, as pointed out in the Statement, calls for expert judgment by those concerned with the full policy implications of the arms control agreements. However, the language of the Joint Resolution imposes a differing standard than that of the Vienna Convention, and, arguably, at least, it imposes obligatons so strict that it would amount to accepting the SALT provisions as obligatory. The Vienna Convention does not go this far. If this is the intention, which the Report says it is not, it should be absolutely clear for the purposes of debate.

ENDNOTE: The application to SALT II of Article 18 of the Vienna Convention of the Law of Treaties relating to the obligatory nature of its provisions considered against should be the expectations of the United States and the Soviet Union with respect to its meaning. While the subject of interpretation of treaties has been only briefly touched upon in my Statement, this Endnote stresses that what might be examined - for the shared expectations and policies - can be approximated by following the guidelines of the Harvard Draft (op. cit., pp. 937-977). Article 19 (a) of that Draft declares:

> Article 19. INTERPRETATION OF TREATIES.
>
> (a) A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, travaux préparatoires (i.e., the negotiating record), the circumstnaces of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.

The comment to this Article is that the Article is intended to stress that treaty application is best served "by giving considered attention to a number of factors which may reasonably be regarded as likely to yield reliable evidence of what that purpose is and how it may best be effectuated under prevailing circumstance." The significance of state practice in this process is clear.

It will be noted that the arms control agreements in serving purposes associated with the security of the two sides do so by establishing, in place of the security expected from arms, the security of the balancing equilibrium of arms control. Both the United States and the Soviet Union might reasonably be expected to move toward maintaining security through the freedom to develop their arms unless and until the arms control agreement that is signed has been ratified. If this perception approximates the realities of state policy, then the SALT II treaty - under the Article 18 constraints - would probably be subject to a strict standard, because it would mean that both sides were so concerned with their security that they would not give up their freedoms except where there is real assurance that it is a reciprocal effort. Such perceptions might be accelerated by the rapidly advancing military technologies. For this reason, it might be argued at least, that the requirement not to "defeat the object and purpose" of the SALT II would be of limited duration, and limited reach, unless some affirmative action is taken by both states to endure that their freedom to act will be constrained how the standard will be construed, as indicated in my Statement, this can be done as part of the drafting.

ENDNOTE II. Brief Clarification is needed concerning the Joint Resolution and verification.

The Joint Resolution should provide that the proposed "interim restraint regime" shall be subject to verification meeting standards no lower than those already set forth in the ACDA Statute. The Resolution, as drafted, only implies that verification is to take place supported by the procedures associated with the Standing Consultative Commission "if applicable or appropriate." The difficulties with respect to verification are both those of policy and those relating to the technical capabilities, and the policy significance of verification lies in its enabling the arms control agreements to serve the use of deterrence as an effective instrument of policy. This policy is to be promoted by the law of the arms control agreements. Verification for these purposes may be considered in several aspects. The first relates to the subject-matter arms control in general because if the agreements reach to subjects that cannot be verified, they are open to cheating and deceptive practices. This might be the case with respect to such matters as testing, research and development, if any of these activities can be conducted free of verification capabilities. However, with respect to procedures, the Standing Consultative Commission is important for verification, because it provides a forum for the exchange of protests and complaints, for the resolution of disagreements or disputes as to verification, and for assuring the smooth workings of the arms control agreements. But here the verification process is a question of how we perceive deterrence, because this

will require taking measures to avoid acquiescence with non-compliance. Continued acquiescence could lead to a change in the treaty relations - the change would occur through applying the SALT or other treaties against less strict standards than those contemplated when they were concluded. But the determinations of all of the above matters are for the President, and not readily managed through a Congress, even when it is exercising its oversight functions. Accordingly, the Joint Resolution, in mandating an interim restraint regime, should be identifying the interim restraint regime with greater certainty, and require that such a regime is not only to be a regime to which there is a commitment by the Soviet Union, but also reflect that that committment will not be sufficient unless the regime itself is verifiable and is subjected to undertakings relating to verification, as indicated in the Statement. These are all matters that might best be in a "sense of the Congress" of what the President should do.

Prepared Statement of Paul D. Kamenar

Mr. Chairman and Members of the Subcommittee:

I am Paul D. Kamenar, Director of Litigation for the Washington Legal Foundation (WLF or Foundation). I am here at the request of the Subcommittee to testify on the constitutional ramifications of Senate Joint Resolution 212. On behalf of the Foundation, let me express my appreciation to the Subcommittee for this opportunity to present our views on this important topic. Because I have had only a few days notice to prepare my remarks, they will necessarily be brief. However, if requested, I will certainly work with the Subcommittee to provide additional comments and information on this topic.

By way of background, the Washington Legal Foundation is a national nonprofit, public interest law firm that engages in matters affecting the broad public interest in the courts and administrative agencies. WLF has more than 80,000 members and an additional 120,000 supporters throughout the United States whose interests the Foundation represents. More particularly, WLF devotes a substantial portion of its resources to matters raising national defense and related constitutional issues. We were the attorneys who represented over 60 members of Congress in the Panama Canal lawsuit wherein we challenged the authority of President Carter to transfer property to another country by treaty, in violation of Article IV, Section 3, Clause 2, which required that any such U.S. property be transferred by approval of the entire Congress. Edwards v. Carter, 580 F.2d 1055 (D.C. Cir. 1978), cert. denied, 436 U.S. 907 (1978).

We were also the attorneys who represented Senator Barry Goldwater and some 25 other Senators and Congressmen in their lawsuit against President Carter challenging his power to terminate our mutual defense treaty with Taiwan without seeking any approval of the Senate and/or the Congress. As you may recall, the District Court agreed with our position and enjoined President Carter from unilaterally terminating the defense treaty.

On appeal, however, the U.S. Court of Appeals for the D.C. Circuit sitting en banc held that the President did have the unilateral power to terminate the defense treaty, although there was a strong and powerful dissent filed in that opinion. The United States Supreme Court granted review of the Goldwater case and without any briefing or oral argument, vacated both the District Court and the Court of Appeals decisions and, in a plurality opinion, stated that the issue presented a political question and that therefore neither court should have reached the merits. Goldwater v. Carter, 444 U.S. 996 (1979). WLF is also currently representing 15 Senators and 14 Congressmen in U.S. District Court opposing an attempt by several liberal Congressmen (George Crockett, Ron Dellums, et al.) to have the court order President Reagan to withdraw all military and economic aid from El Salvador as allegedly violative of the War Powers Resolution. Although that case does not deal directly with the treaty power, it does concern the proper allocation of power between the branches of our government.

In both the Panama Canal and Taiwan cases involving the treaty power of the President, the issues that were presented dealt with whether the President exceeded his constitutional powers. In the issue before the Subcommittee today, however, it appears that we are faced with the opposite but related issue presented in the Goldwater and the Panama Canal case; namely, whether the Congress, by simple majority of both Houses, may pass a resolution or law that purports to formally bind and commit this country to limit the development, testing, and deployment of arms under the SALT I agreements, which expired in 1977, and the SALT II agreement, which of course, has never been approved by two-thirds of the Senate nor ratified by the President and is therefore, not a treaty.

A related issue is to what extent Section 33 of the Arms Control and Disarmament Act authorizes or prohibits the passage of Senate Joint Resolution 212, paragraph 3. In a broader sense, what we are concerned with today is the proper allocation of

powers between the various branches of our government to commit the United States to international obligations. It is my opinion, after reviewing the Resolution and researching the issues carefully, that paragraph 3 which purports to formally bind the United States to a policy of following SALT I and SALT II is an unconstitutional usurpation of power belonging properly to the President and Senate, and furthermore, is inconsistent with the purpose and intent of section 33 of the Arms Control and Disarmament Act (ACDA).

Treaty Making Power

Article II , Section 2, of the United States Constitution provides in part that "the President ... shall have power by and with the advice and consent of the Senate, to make treaties, provided that two-thirds of the Senators present concur ...." As made clear by this section of the Constitution, treaty making is a shared power between the President and the Senate. Indeed, even if the Senate were to approve by two-thirds vote any proposed treaty, such as the SALT II treaty, the President still retains the final authority to refrain from exchanging instruments of ratification which would make the treaty binding upon the parties.

The House of Representatives has no constitutional role in the matter at all, unless, of course, the subject matter of the treaty imposes obligations upon the United States which must be carried out by certain legislation that would involve the House of Representatives such as appropriations. Nevertheless, it was clearly the Founding Fathers' intent to require that treaties or international obligations be difficult to enter into and therefore, required the supramajoritian two-thirds consent of the Senate.

I am, of course, aware of the rapidly growing practice over the last fifty years for the Executive to enter into what are called "executive agreements" between countries on a variety of issues. In 1930, the United States concluded 25 treaties and

only 9 executive agreements. By 1972, there were 947 treaties in comparison to 4,359 executive agreements. See Hearings, "Congressional Review of International Agreements," 94th Cong., 2d Sess., July 1976, at 207-19. Indeed, the practice has developed to such an extent that executive agreements are even negotiated and concluded by Secretaries or Assistant Secretaries of various Executive agencies, such as the Department of Commerce, the Department of Treasury, and the like. The most notable example of such executive agreements arises in the field of international trade agreements. Nevertheless, it appears that approximately 99 percent of these executive agreements find their authorization in either legislation by the Congress or by treaties approved by the Senate. There are only a few executive agreements which appear to have been negotiated and entered into by the President upon what is claimed to be his plenary power without any legislative authority.

The proliferation of such executive agreements has led to the enactment of the Case Act, 1 U.S.C. §112b, which requires the State Department to submit all international agreements, including I might emphasize, "oral" agreements to the Congress within sixty days after they have entered into force. In this manner, it is hoped that the Senate and the Congress can exercise whatever legislative oversight it desires. If indeed President Reagan's May 31, 1982 statement regarding arms control constituted an international agreement as some suppose, then the State Department has until midnight tonight (July 30, 1982) to submit such agreement to the Congress, a most unlikely event.

Nevertheless, the constitutional validity of these executive agreements is questionable. As stated by Professor Raoul Berger of Harvard University, there is "an unambiguous constitutional requirement that treaties -- meaning all international agreements and all that goes into their making -- are to be the joint function of the President and Senate." Berger, "The Presidential Monopoly of Foreign Relations," 71 Mich. L.R., at 49 (1972).

On the other hand, the Supreme Court has on occasion given validity to certain executive agreements, but in my opinion, those decisions do not and can not give the President the power to make a treaty without the advice and consent of the Senate; nor can any of those decisions give power to the Congress to make treaties. In United States v. Belmont, 301 U.S. 324 (1937) the Supreme Court upheld the validity of an exchange of diplomatic correspondence between the Soviet government and the United States regarding a final settlement of claims and counterclaims between the Soviet government and the United States. In essence, the Soviet government assigned their claims against American nationals to the United States. The Court focused, however, only on that particular agreement and indicated that it did not rise to the level of a treaty because of its very nature, comparing it to a simple postal convention or protocol. As recent as March 31st of this year, the Supreme Court had occasion to interpret the word "treaty" in another context and concluded that the word also included certain executive agreements. Nevertheless, it should be noted that the Court, in a footnote, made express reference to Section 33 of the Arms Control and Disarmament Act, stating that the phrase "except pursuant to the treaty making power of the President under the Constitution" meant only treaties under Article II of the Constitution as opposed to executive agreements. See Weinberger v. Rossi, 50 U.S.L.W. 4354 (March 31, 1982).

There does not necessarily seem to be any particular rhyme or reason why an agreement between another country and this country is cast in the form of a treaty or an executive agreement. For example, we have treaties governing such obscure issues as the status of three uninhabited coral reefs in the Caribbean or regulating shrimp fishing off the coast of Brazil; but other agreements that are obviously of much more importance, such as military base agreements and even certain arms limitation agreements, have been casted in the form of protocol and executive agreements rather than as treaties. This is a most

disturbing phenomenon and one that raises serious separation of powers issues.

As noted in the book "Foreign Policy by Congress" by Professors Thomas M. Franck and Ed Weisband of New York University Law School/ the practice of making executive agreements is constitutionally dubious:

> The Constitution provides but one way in which the United States can enter into international commitments: via treaties made "by and with the Advice and Consent of the Senate ...." Still, it is undisputable that, before and after the adoption of the Constitution, Presidents occasionally signed international arrangements, not called treaties, which became binding without advice and consent.
>
> * * * *
>
> Executive officials, nowadays, cite these early precedents to conclude that long "years of congressional practice have established the legitimacy" of this procedure. But earlier Presidents seem to have had doubts. Monroe, on the strength of a law permitting him to sell or lay up naval vessels on the Great Lakes, entered into the Rush-Bagot executive agreement of 1817 with Great Britain, limiting naval armaments on the Great Lakes. But then he began to have doubts and sent the text to the Senate for its consent.
>
> Such doubts are appropriate. If the drafters of the Constitution had intended to permit serious U.S. commitments to be made either by and with the advice and consent of two-thirds of the Senate or by a law passed by a simple majority of each House, why was only the first, more onerous process debated and agreed to? The answer is that the drafters wanted important international commitments made by a process requiring a higher degree of consensus than is needed to pass an ordinary law. The convention thoroughly aired a proposal, advanced by James Wilson and Gouverneur Morris, to have international commitments made by the President and a majority of both House and Senate. It was decisively rejected. (Emphasis added).

Over the years, the State Department has consistently stated that the executive agreements are a proper and necessary mechanism because of the flexibility it gives the executive branch to negotiate and enter into agreements with other countries on a variety of issues that are not important enough to trigger the treaty making process. I have several objections to this argument.

First, it raises a problem of deciding what subjects are or are not suitable for a treaty format. As this Subcommittee

knows, the State Department in Circular 175 lists the various criteria of an obligation to determine whether or not an international agreement should be concluded as a formal treaty or as an executive agreement. It seems clear to me that even under the State Department's own criteria, that any commitment between this country and another country relating to such an important subject as our national defense and security, and arms control, certainly rises to the level of being suitable for a treaty. Nevertheless, President Carter at one time had threatened to implement SALT II as an executive agreement should he not get the Senate's approval of it as a treaty. But it seems to me that Senate Resolution 212 is, in effect, unconstitutionally making a treaty commitment by simple majority of both houses of Congress.

The second argument made by the State Department justifying executive agreements is simply expediency. The argument that the international affairs of our country have become more and more complicated since the days of George Washington and that consequently, the treaty making process is a cumbersome method that should not be held applicable in all situations. There are several answers to that argument. One is that the Constitution can certainly be amended to modify the treaty making power and allow for executive agreements. However, if one were to look to another provision of Article II, Section 2, concerning the appointment power of the President, we find there an analogous provision that requires that Presidential appointments of ambassadors, judges, and all officers of the United States must receive approval of the Senate. Over the last 200 years, we have had a tremendous growth in the size of the federal government and consequently, a growth in the number of officers of various Executive Branch agencies and independent agencies. There are literally thousands of officers of the United States that require approval by the United States Senate. Although many of them are, of course, in the military, there are never-

theless in addition hundreds of key civil officers of the United States who run our agencies or serve as our ambassadors, and the like. In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court struck down an attempt by the Congress to appoint members of the Federal Election Commission. The Court clearly held that the appointment of officers must comply with Article II, Section 2 and therefore, be nominated by the President, with the advice and consent of the Senate.

It seems to me that if the Senate is quite capable of approving hundreds of officers of the United States who are responsible for running our government, the Senate should certainly be equipped to provide its advice and consent for the many obligations that we have with other countries. Obviously, agreements such as postal conventions and other mundane matters, would no doubt receive routine approval in the same way as there is now routine approval of the nomination of certain officers of the United States. However, when there are appointments of key Executive Branch officials or Justices of the Supreme Court, the Senate is quite capable of conducting extensive hearings to review their qualifications. In like manner, the Senate is also quite capable of selecting those treaties of paramount importance in order to give them the attention they deserve.

In this regard, I agree with Senator Charles Percy who, in a recent law review article concerning the advice and consent function of the Senate with respect to the appointment clause, stressed the historical purposes of our Founding Fathers in this area. Percy, "Advice and Consent: A Reevaluation," 1978, S. Ill. U.L.J. 31. Senator Percy commended the Senate for taking its constitutional responsibility of advice and consent with increasing seriousness. He stated that although deference should be given to a President's nominee, "this does not justify Congressional abdication of its responsibility to examine these appointments." He concluded and I quote: "However, if the Senate is to participate fully in the appointment process as

envisioned by the Founding Fathers, it is clear that basic reforms will be needed." The reform he suggested was not to amend the Constitution or dilute or relax the Senate's advice and consent power, but to strengthen it by establishing a Senate Office of Nominations which would screen the nominees and select those that the Senate should give particular attention to. In like manner, Senator Percy's suggestion could be applied to the treaty approving process if it is so cumbersome by setting up a Senate Office of Treaties or perhaps a Subcommittee on Treaties of the Foreign Relations Committee, which would be able to review all treaties to determine which deserve more serious scrutiny than others. But in all cases, the Senate should retain its constitutional prerogative of approving all treaties, i.e., all international agreements.

Section 33 of the ACDA

Section 33 of the ACDA, 22 U.S.C. § 2573, provides in relevant part:

> [N]o action shall be taken under this chapter or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.

This amendment to the Act was proposed by Congressman Fountain in 1961 and was accepted without debate. Nevertheless, the legislative history indicates very clearly that the law was intended merely to prohibit the President from taking any unilateral action that would obligate or commit the United States to limit or reduce its arms in the form of executive agreements. It was envisioned that any agreement would be submitted to the Senate as a treaty, but as a safety precaution, it was felt that if the President had made an executive agreement other than a treaty (regardless of the constitutionality of such modality)

it would not be valid unless further authorized by the Congress by "further affirmative legislation." I might add that Senator Lausche from Ohio proposed an amendment to the Fountain provisions which would merely clarify the understanding that any such arms agreement would be submitted as a treaty to the Senate. Senator Fulbright concurred fully in that view. Nevertheless, the Foundation amendment was enacted. For a comprehensive legislative history of Section 33 of the ACDA, see Congressional Research Service Memorandum, dated September 7, 1977, entitled "Is Congressional Approval of the SALT Interim Required?"

In any event, Section 33 does not purport by its terms to confer any powers upon the Congress to make or bind the United States to any type of arms agreements. All it purports to do is limit the power of the President from obligating the U.S. to any type of arms agreements unless those agreements have been made pursuant to the treaty making power under Article II, or unless "authorized" by affirmative legislation.

Assuming, arguenda, that the Congress in addition to the Senate's treaty making power does have the power to so "authorize" the President to obligate the U.S. to limit or reduce its arms, it appears that the wording of Senate Joint Resolution 212 does not merely do that. The key provision of S.J. Res. 212 states that "to provide a basis for progress during the START negotiations the U.S. shall continue to refrain from actions that will undercut the SALT I and SALT II agreements provided the Soviet Union shows equal restraint." (emphasis added).

This paragraph does not say that the "President is hereby authorized to enter" into any such agreements with the Soviet Union. Indeed, he has not done so. The President has not made any executive agreement with the Soviet Union along the lines comtemplated by Section 33. What this legislation does in fact do is to mandate that the United States be at once committed to follow SALT I and SALT II vis a vis the Soviet Union.

Thus, this resolution is of dubious constitutionality by usurping the power of the President and Senate to make treaties, as well as inconsistent with the purpose of Section 33 of ACDA.

Unilateral Policy Declarations

Besides treaties and executive agreements, certain obligations may arise under international law by way of unilateral policy declarations, even though the validity of such declarations under U.S. law is suspect. The International Court of Justice discussed the nature of these obligations in a case involving unilateral statements by the French government regarding the discontinuance of nuclear atmospheric testing in 1974.

The United States has experimented on occasion with this procedure. For example, the United States and Russia issued parallel statements of policy in late September 1977 indicating that neither side would take any actions during the negotiation of SALT II that would be inconsistent with SALT I Interim Agreement which was scheduled to expire in October 1977. Thus, at the earliest, SALT I expired by its terms on October 3, 1977; at the latest, by the very terms of the questionable unilateral statements of the U.S. and U.S.S.R., it expired on May 11, 1979, the day when both sides announced that an agreement had been reached on SALT II, and hence, negotiations ceased. Thus, it is clear by anybody's standards that SALT I is a dead letter.

As for SALT II, although signed by President Carter, it has not been approved by the Senate. And even if it were, there can be hardly any doubt that President Reagan, who termed the treaty "fatally flawed" would never exchange the necessary ratification documents necessary to bring into force that treaty's obligations. There has been some suggestion that SALT II does have some life to it of an inchoate nature by virtue of Article 18 of the Vienna Convention of Treaties which states that parties will not take any action inconsistent with signed

but unratified treaties while they are waiting formal ratification. This is, however, a very weak argument.

In the first place, neither the United States nor Russia has ratified the Vienna Convention of Treaties, and although the United States does seem to follow it, nevertheless, it is not binding on us. Secondly, Article 18's purpose was to prevent unfairness by undermining an agreement on which another state is relying. With regard to SALT II, however, it is very clear that this Administration does not intend to have SALT II ratified, and it can be hardly said that the Soviet Union is put at a disadvantage because they are relying on its terms. Indeed, the U.S.S.R.'s consistent and flagrant violations of these agreements are well known. Finally, it should be noted that Section 33, passed in 1961, predates the 1969 Vienna Convention of Treaties. Accordingly, SALT II is also a dead letter and creates no obligations whatsoever on the United States. What S.J. Resolution seeks to do is to breathe life into both SALT I and SALT II in a most mischievous and unconstitutional manner.

On May 31, 1982, President Reagan announced the initiation of the START talks. In that statement, the President also said:

> As for existing strategic arms agreements, we will refrain from actions which undercut them so long as the Soviet Union shows equal restraint.

This statement is general and non-specific, and does not appear to have been made to create any binding obligations upon the United States. There is no mention of SALT I or SALT II. As Senator Helms correctly pointed out in the Committee Report accompanying S.J. Resolution 212, the only "existing strategic arms agreement" is the 1972 ABM treaty. This statement by President Reagan is thus in sharp contrast to the statement by Secretary Vance on September 23, 1977 which very clearly spelled out what was intended:

> In order to maintain the status quo while SALT II negotiations are being completed, the United States declares its intention not to take any action incon-

> sistent with the provisions of the Interim Agreement on Certain Measures With Respect to the Limitation of Strategic Offensive Arms which expires October 3, 1977, and with the goals of these ongoing negotiations provided that the Soviet Union exercises similar restraint.

Thus, S.J. Res. 212 attempts to take a generalized and non-binding policy statement and create a specific obligation that is intended to have, as stated by the Senate Foreign Relations Committee, the "full force and effect of law." In fact, it even goes further than that. The exact language of paragraph three states:

> (3) to provide a basis for progress during the START negotiations, the United States shall continue to refrain from actions which would undercut SALT I and SALT II agreement, provided the Soviet Union shows equal restraint ....

Thus, this obligation is also tied into the START negotiations, and intends to influence those negotiations. It is clear, however, that the Senate and Congress cannot intrude upon the President's power to negotiate a treaty. The Senate may certainly give its "advice" under Article II, and may withhold its "consent" but it cannot mandate a regime which affects the negotiation of a treaty. The progress of the START negotiations could very well be hampered instead of furthered if there were a binding obligation of the U.S. to follow SALT I and SALT II, since there would be no pressure on the U.S.S.R. to negotiate ernestly.

CONCLUSION

The Washington Legal Foundation submits that the language of S.J. Res. 212, paragraph (3), is an unconstitutional attempt to undermine the treaty making powers of both the President and the Senate and accordingly, its passage would not be in the public interest. Thank you for the opportunity to present these comments.

Senator EAST. Without further comment, we shall adjourn.

I should like to note that the record will remain open for additional statements that others may wish to submit, and I know that Prof. Charles Rice of the University of Notre Dame will be submitting a statement for the record.

We stand adjourned.

[Whereupon, at 12:37, the subcommittee adjourned.]

APPENDIX

PROPOSED LEGISLATION

Calendar No. 705

97TH CONGRESS
2D SESSION

S. J. RES. 212

[Report No. 97–493]

With respect to nuclear arms reductions.

IN THE SENATE OF THE UNITED STATES

JULY 12, 1982

Mr. PERCY, from the Committee on Foreign Relations, reported the following original joint resolution; which was read twice and placed on the calendar

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JOINT RESOLUTION

With respect to nuclear arms reductions.

Whereas the greatest challenge facing mankind is to prevent the occurrence of nuclear war by accident, miscalculation, or design;

Whereas an unrestricted arms race would threaten peace and security, divert resources needed for the betterment of mankind, and undermine the mutual confidence needed to attain agreement on a new arms reductions agreement;

Whereas the American people, who are a people of peace, maintain nuclear armaments only in the defense of freedom and yearn for world conditions in which they could do far more to lift the burdens of human privation and despair;

99-571 O—82——13

Whereas the United States and the Soviet Union have agreed to begin formal negotiations on the limitation and reduction of strategic armaments in Geneva on June 29, 1982;

Whereas President Reagan has declared that the United States would continue to refrain from actions that would undercut existing SALT agreements as long as the Soviet Union shows equal restraint: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That—

(1) the Congress commends the President for his proposal to the Soviet Union to initiate strategic arms reductions talks (START) and supports his announced objective of attaining an agreement providing for verifiable, equitable, and militarily significant reductions in strategic offensive arms;

(2) such agreement should, among other restrictions, provide initially for sharply reduced and equal levels on the aggregate number of ICBM's and SLBM's and the aggregate number of warheads deployed on these systems, and subsequently for further significant, balanced, and verifiable reductions of nuclear weaponry in a manner which enhances stability and deterrence;

(3) to provide a basis for progress during the START negotiations, the United States shall continue to refrain from actions which would undercut the

SALT I and SALT II agreements, provided the Soviet Union shows equal restraint. The United States should raise questions of possible inconsistencies related to this interim restraint regime with the Soviet Union through the United States/Soviet Standing Consultative Commission (SCC). If the SCC is not available or appropriate, then the President should raise the issue in another appropriate channel;

(4) to encourage arms restraint and crisis stability through steps which build confidence, the United States should also propose to the Soviet Union and other nations practical measures—

(a) to reduce the danger of nuclear war through accident or miscalculation,

(b) to prevent the use of nuclear weapons by third parties, including terrorists,

(c) to cooperate more closely to halt the worldwide proliferation of nuclear weapons, including the establishment of additional measures by nuclear supplier nations, and

(d) to involve all nations possessing nuclear weapons in the arms control process at the appropriate time;

(5) the President is urged to complete his review of the pending Threshold Test Ban Treaty and the

Peaceful Nuclear Explosions Treaty and promptly report his recommendations with respect to the ratification of these treaties; and

(6) the United States should continue to press month after month, year after year, to achieve balanced, stabilizing arms reductions, looking at the earliest possible time, to the elimination of all nuclear weapons from the world's arsenals.

ADDITIONAL SUBMISSIONS

PREPARED STATEMENT OF PROF. CHARLES E. RICE

This statement concerns S.J. Res. 212, which has been favorably reported by the Senate Committee on Foreign Relations and which provides in part:

> To provide a basis for progress during the START negotiations, the United States shall continue to refrain from actions which would undercut the SALT I and SALT II agreements, provided the Soviet Union shows equal restraint.

The Interim agreement on Strategic Arms Limitation, known as SALT I, expired in October, 1977, and is therefore no longer effective in international law. The SALT II treaty was signed in 1979; it provides for its expiration in 1985. SALT II was submitted by President Carter to the Senate but, after hearings had been held on it, President Carter, on January 3, 1980, requested the Senate to delay further consideration of the Treaty. SALT II was never voted on by the Senate and, as the Committee on Foreign Relations noted, "Although President Reagan has made clear that he has no intention of seeking ratification of the SALT II treaty, the agreement is still formally pending before the Committee." <Senate Committee on Foreign Relations, Report, Nuclear Arms Reductions (97th Cong., 2nd Sess., July 12, 1982), p.9>

Article I, Section 8, of the Constitution confers broad powers on Congress over the national defense, including the powers to "declare War," to "raise and support Armies" (subject to the limitation that "no Appropriation of Money to that Use shall be for a longer Term than two Years"), to "provide and maintain a Navy," to "make Rules for the Government and Regulation of the land and naval Forces," and to provide for the militia. These defense powers of Congress have been broadly construed <See, for example, Selective Draft Law Cases, 245 U.S. 366 (1917)> S.J. Res. 212 would be clearly within the power of Congress if, without reference to the creation or maintenance of an international obligation, it merely established disarmament policies and levels of armament, whether in general or

in specific detail, for the United States. S.J. Res. 212, however, purports to establish what the Committee on Foreign Relations called "an intermim restraint regime." (Committee on Foreign Relations, Report, Nuclear Arms Reductions, supra, p. 6). This "regime" would have "the full force and effect of law" (Report, Nuclear Arms Reductions, p. 10) and it would have "binding effect" with respect to the relations between the United States and the Soviet Union on this matter, (Report, Nuclear Arms Reductions, p. 8). The purpose of S.J. Res. 212 is manifestly to create an international obligation on the United States, contingent on reciprocation by the Soviet Union.

Generally, an international obligation may be created so as to bind the United States in any of three ways:

1. By treaty, made by the President with the advice and consent of the Senate, "provided two thirds of the Senators concur." (Art. II, Sec. 2, cl. 2).
2. By executive agreements with the approval of both houses of Congress. (See B. Altman & Co. v. U.S. 224 U.S. 583 (1912).
3. By executive agreement by the President, without the consent of Congress. (See U.S. v. Belmont, 301 U.S. 324 (1937); see generally, Henkin, Foreign Affairs and the Constitution (1972), chapters 5 and 6).

If an executive agreement embodying the terms of S.J. Res. 212 had been submitted to the Congress as a whole, S.J. Res. 212 could claim justification as a measure to secure Congressional approval of that agreement. If that were the case, the question would arise as to whether Congresss should acquiesce in the widespread asumption "that the Congresssional-Executive agreement is a complete alternative to a treaty." (Henkin, Foreign Affairs and the Constitution (1972), p. 175). It was with reason that the Constitutional Convention required a super-majority in the Senate for the approval of treaties. The super-majority requirement is a safeguard against precipitate action, a safeguard which is lessened when an international obligation equivalent to a treaty is created by mere

majority approval even when that approval must be obtained in both houses of Congress. A legitimate argument can be made that executive agreements, even when approved by Congress, should be reserved for matters of less grave import than those within the purview of the treaty power. Considerable difficulty would be involved, of course, in making the necessary distinctions. <See State Department Procedures on Treaties & Other International Agreements, Circular 175, Oct. 25, 1974, 11 FAM 700; see Glennon & Franck, United States Foreign Relations Law: Documents & Sources (1980), Vol. I, p. 203>. The issue may not be directly germane to these hearings but it merits a thorough consideration at an appropriate time.

In fact, however, SALT II is not an executive agreement. It is a treaty. It was submitted by the President only to the Senate and it was submitted as a treaty. Having been deferred without receiving the 2/3 vote required for a treaty, SALT II cannot magically be transformed retroactively into an executive agreement without undermining the integrity of the constitutional treaty process. The President is the voice of the nation in foreign affairs. It is his responsibility to determine the form of the agreements he concludes with foreign nations. If he submits a treaty to the Senate, he is entitled to have it considered as a treaty. If, without his consent, the Senate were to transform it into an executive agreement by approving it through a joint resolution, the presidential prerogatives would seem to have been invaded and the prerogatives of the House of Representatives would seem to have been enlarged unconstitutionally by the conferral on the House of a direct role in the approval of treaties. A worse case could arise if the President, having submitted a treaty to the Senate, were to conspire with the Senate to treat it instead as an executive agreement requiring only majority approval in both Houses. A treaty lacking 2/3 support in the Senate is, in a sense, a failed treaty and the people are entitled to assurance that it will not be imposed upon them through lesser majorities in both Houses. If, through the adoption of S.J. Res. 212, the Senate undertakes to treat SALT II as an executive

agreement, it will have created a precedent that will be most difficult to confine. There is no reason to expect that that precedent will be confined to cases, such as SALT II, where the treaty has been deferred and not rejected. Adoption of S.J. Res. 212 will open the door to the perhaps routine substitution of joint resolutions for treaties which have been voted on by the Senate and which have failed to obtain the prescribed 2/3 vote. The constitutional requirement of a 2/3 vote in the Senate could thereby become a dead letter. At the very least, it can be said that if the treaty provision is to be excised from the Constitution, it ought to be done forthrightly through the amending process.

S.J. Res. 212 undertakes to treat SALT II as an executive agreement and it compounds the error by expressly renewing the obligations of SALT I which has expired. It has been argued, however, that S.J. Res. 212 is authorized by Section 33 of the Arms Control and Disarmament Act of 1961 <22 U.S.C. 2573>, which provides, in part, that, "no action shall be taken under this chapter or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.

This language was added to Section 33 on the floor of the House of Representatives by Representative Fountain of North Carolina. Representative Fountain's amendment was accepted by the manager of the bill without debate and without a vote. None of the Senate or House reports on the Arms Control and Disarmament Act ~~mentions~~ analyzes the Fountain amendment. Representative Fountain did, however, explain his purpose on the floor of the House:

> This amendment is designed to insure that on the subject of arms control no President of the United States, whoever he may be, will ever take any action that is not in conformity with the Constitution of the United States. No matter how meritorious any arms reduction proposal of the future may be, and regardless of what the rest of the world may be willing to agree to, the President cannot under this amendment commit America to it, except pursuant

> to the treatymaking power under the Constitution, or by affirmative legislation by both the House and the Senate. It forbids a President acting on his own..... I believe that no action should be taken by the then President under this or any other law, to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except in a duly constitutional way upon the approval of two-thirds of the U.S. Senate or by affirmative legislative action of the entire Congress. <Cong. Rec., 87th Cong., Vol. 107, p. 20309, Sept. 19, 1961>.

Clearly, the Fountain Amendment to Section 33 was not intended to authorize the Congress, on its own and without the participation of the President, to bind the United States to an international disarmament obligation. To impose such an obligation by mere statute is beyond the power of Congress. Instead, the Fountain Amendment was designed to forbid "a President acting on his own." It ensured that no President would commit the United States to disarmament on his own initiative; instead, his power to conclude disarmament agreements would have to be exercised in the form of a treaty or an executive agreement "authorized by further affirmative legislation."

In the view of the Committee on Foreign Relations, S.J. Res. 212 is designed to"provide the affirmative legislative authority contemplated in Section 33 of the Arms Control and Disarmemnt Act" for the President to conclude an agreement with the Soviet Union along the lines of S.J. Res. 212. "In this regard," said the Committee, "enactment of this joint resolution increases the President's options in dealing with the Soviet Union." <Report, Nuclear Arms Reductions, pp. 9-10> According to this theory, S.J. Res. 212 is a prospective authorization for the President to make an executive agreement. Apart from the issue of whether an international commitment on an issue as grave as disarmament ought to be made in such manner rather than through the 2/3 vote in the Senate required by the treaty power, the difficulty with this theory is that S.J. Res. 212 is not couched in terms of an authorization. Rather it is self-executing in that it purports itself to impose an international obligation on the United States:"...the United States <u>shall continue to refrain</u> from actions which would undercut....." <S.J. Res. 212 (Emphasis added.)> The plain

meaning of S.J. Res 212 is that it does attempt to impose an immediate international obligation on the United States. It is an obligation, moreover, which is expressly keyed to the terms of the SALT I and SALT II agreements. In this light, S.J. Res. 212 is a unilateral effort by Congress, on the one hand, to revive the expired SALT I and, on the other, to impose SALT II as an international obligation on the United States despite the failure of that treaty to obtain the required 2/3 approval of the Senate. This can fairly be described as an attempt to make an end run around the limitations imposed by the Constitution upon the treaty power.

A further issue raised by S.J. Res. 212 is the effect of Article 18 of the Vienna Convention on the Law of Treaties, which provides:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Neither the United States nor the Soviet Union has ratified the Vienna Convention. Nevertheless, Article 18 has been interpreted by the United States government as reflecting "generally acceptable norms of international law" and as therefore binding as customary international law on the United States during the period between the signing of a treaty or its ratification. <See Turner, Legal Implications of Deferring Ratification of SALT II, 21 Va.J of Inernational Law 747, 768 (1980-81)>. "It has been suggested that, at the least, this language prohibits irreversible violations of the treaty. As applied to the context of an arms control treaty, the principle of irreversibility embodied in article 18 would not require a State to comply with numerical ceilings for existing weapons, for that State could still destroy the additional weapons if the treaty ever enters into force. But under this interpretation of Article 18, a State would be prohibited from research and testing which would result in permanent and

irreversible benefits prohibited by the terms of the treaty." <Id. at 764 (Emphasis in orignal)>.

There is an obvious tension between the customary law reflected by Article 18 and the limitations imposed by the United States Constitituion on the treaty power. It is claimed that S.J. Res. 212 is justified as an implementation of a Presidential commitment, i.e., the signing of Salt II, which is a binding legal obligation on the United States through customary international law regardless of the deferral of action by the Senate on SALT II itself. In legal terms, the postponement of action on a treaty submitted to the Senate is not equivalent to the rejection of that treaty by the Senate. Nevertheless, it is clear that SALT II, as a treaty, is dead as far as the advice and consent of the Senate are concerned. When President Carter requested postponement of Senate consideration, the treaty evidently was lacking the necessary 2/3 vote and President Reagan "has made clear that he has no intention of seeking ratification of the SALT II Treaty." <Report, Nuclear Arms Reductions, p. 9>. Whatever the obligation of customary international law, as reflected by Article 18, with respect to a treaty which still has some prospect of approval of the Senate, there can be no basis for extending that obligation to a treaty as moribund as SALT II concededly is. If the Congress, by enacting S.J. Res. 212, were to regard SALT II as a binding international obligation so as to justify legislation declarative of that obligation, the result would be to truncate the treaty clause of the Constitution by rendering the approval of the Senate a wholly optional formality.

THE WHITE HOUSE

WASHINGTON

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August 11, 1982

Dear Senator East:

This is in further response to the June 27 letter which you cosigned with three of your Senate colleagues. We appreciate your expression of concern over the question of the SALT II Treaty and the recent Senate Foreign Relations Committee arms control resolution containing a reference to SALT II.

Let me assure you that the President will not support any resolution which would make the SALT II Treaty legally binding. As you know, he spoke out strongly against the SALT II Treaty during his campaign and before. The SALT II Treaty was unacceptable in 1979, and it remains so today.

The President welcomes the fact that the Senate Foreign Relations Committee resolution contains language supporting our START proposal which calls for substantial reductions to equal levels. In addition, the Committee rejected the nuclear freeze proposal. Those are positive elements.

The language in Section 3 of the Resolution, however, is inappropriate for a number of reasons. If the Committee's intent was to endorse the President's interim restraint policy, we believe that would be better accomplished in a non-binding and advisory form. This would avoid the legal, technical and political problems that have been raised by the existing language.

With respect to interim restraints, our current policy is to refrain from actions which would undercut existing agreements so long as the Soviet Union shows equal restraint. This should improve the environment for negotiations on reductions, and avoid irreversible acts which would complicate the negotiation of the limitations and provisions we seek in our START proposal. We base our policy of not undercutting existing agreements on our forward-looking commitment to START and not on any change in our assessment of the flaws of past SALT agreements. At the same time, we will continue carefully to monitor Soviet activity with regard to existing agreements.

Our policy does not constitute acceptance of the failures of SALT II such as the unilateral right of the Soviets to heavy missiles, the significant Soviet advantage in ballistic missile throw-weight, the exclusion of the Backfire bomber, the problems associated with defining the one new type of ICBM permitted by the Treaty, or any other of the serious flaws which made SALT II unacceptable.

This position represents an interim policy which allows for our program for modernization of our strategic forces. The modernization program, as you know, upgrades all three legs of the strategic Triad and also calls for vigorous improvements in command, control and communications for our strategic forces. These programs must go ahead if we are to maintain a credible deterrence posture.

The underlying foundation of the President's strategic nuclear policy is the national security interest of the U.S. Our policy toward interim restraints will depend on our continuing assessment of this interest. Rest assured that as we pursue the goal of stabilizing and verifiable reductions in Soviet and US nuclear weapons, we are mindful of the need to maintain a strong and stable nuclear deterrent.

With best wishes,

Sincerely,

Ken D.

Kenneth M. Duberstein
Assistant to the President

The Honorable John P. East
United States Senate
Washington, D.C. 20510